



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

312 North Spring Street, Room G-8
Los Angeles, CA 90012
Tel: (213) 894-3575

SOUTHERN DIVISION
411 West Fourth Street, Suite 1053
Santa Ana, CA 92701-4516
(714) 338-4750

EASTERN DIVISION
3470 Twelfth Street, Room 134
Riverside, CA 92501
(951) 328-4450

SHERRI R. CARTER
District Court Executive and
Clerk of Court

To: Clerk, United States District Court
Southern District of California
880 Front Street, Suite 4290
San Diego, CA 92101

2354	1981
FILING FEE PAID	
Yes	No
IFP MOTION FILED	
Yes	No
COPIES SENT TO	
Court	ProSe

FILED
JUN - 3 2008
CLERK, U.S. DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA BY <i>[Signature]</i> DEPUTY

Re: Transfer of our Civil Case No. CV 08-2310 JVS (SS)

Case Title: Javier Espinoza Rodriguez v. John C. Marshal, Warden

Dear Sir/Madam:

'08 CV 1007 H CAB

An order having been made transferring the above-numbered case to your district, we are transmitting herewith our file:

- ☐ Original case file documents are enclosed in paper format.
☒ Electronic Documents are accessible through Pacer.
☒ Other: Certified copy of the Transfer Order

Very truly yours,

Clerk, U.S. District Court

Date: 6/1/08

By Ed Sambrano
Deputy Clerk

cc: All counsel of record

TO BE COMPLETED BY RECEIVING DISTRICT

Please acknowledge receipt via e-mail to appropriate address listed below and provide the case number assigned in your district:

- ☒ CivilIntakecourtdocs-LA@caed.uscourts.gov (Los Angeles Office)
☐ CivilIntakecourtdocs-RS@caed.uscourts.gov (Riverside Office)
☐ CivilIntakecourtdocs-SA@caed.uscourts.gov (Santa Ana Office)

Case Number: _____

Clerk, U.S. District Court

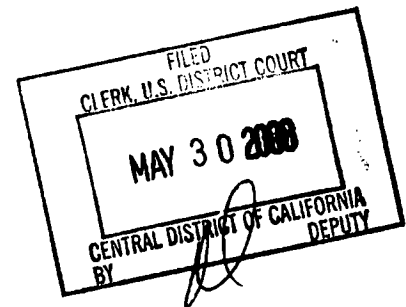
Date: _____

By _____
Deputy Clerk

I hereby attest and certify on 6/2/08
that the foregoing document is a full, true
and correct copy of the original on file in
my office, and in my legal custody.

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DEPUTY CLERK



Priority ☒
Send ☒
Enter ☒
Closed ☒
JS-6/JS-6 ☒
JS-2/JS-3 ☒
Scan Only ☒

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAVIER ESPINOZA RODRIGUEZ,
Petitioner,
v.
JOHN C. MARSHALL, Warden,
Respondent.

NO. CV 08-02310 JVS (SS)

ORDER TRANSFERRING ACTION TO
SOUTHERN DISTRICT OF CALIFORNIA

On April 8, 2008, Petitioner, a California state prisoner proceeding pro se, filed a Petition for Writ of Habeas Corpus ("Petition") pursuant to 28 U.S.C. § 2254. Upon review of the Petition, the Court finds that, in the interest of justice, this case should be transferred to the United States District Court for the Southern District of California.

A petition for writ of habeas corpus brought by a state prisoner may be filed in the United States District Court for either the judicial district in which the petitioner is presently confined or the judicial district in which he was convicted and sentenced. See 28 U.S.C.

1 2241(d); Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484,
2 497, 93 S. Ct. 1123, 35 L. Ed. 2d 443 (1973). The current Petition
3 attacks a conviction sustained and sentence imposed in the San Diego
4 County Superior Court, which is within the jurisdictional boundaries of
5 the United States District Court for the Southern District of
6 California. See 28 U.S.C. § 84(d). Petitioner is presently confined on
7 the San Diego County conviction at the California Men's Colony in San
8 Luis Obispo County, California. San Luis Obispo County is within the
9 jurisdictional boundaries of the United States District Court for the
10 Central District of California. See 28 U.S.C. § 84(c). Thus,
11 jurisdiction over the Petition exists concurrently in the Southern
12 District of California and the Central District of California.

13
14 However, the Court has determined that the Southern District of
15 California is the more appropriate forum for adjudication of the
16 Petition. Braden, 410 U.S. at 493-500 (applying traditional venue
17 considerations to determination of where the action should be located);
18 see also Fest v. Barte, 804 F.2d 559, 560 (9th Cir. 1986) (same).
19 Petitioner attacks his conviction and sentence rather than the execution
20 of his sentence. Accordingly, all relevant evidence, records and
21 witnesses are more readily available within the Southern District of
22 California. Moreover, the expense and risk of transporting Petitioner
23 to the Southern District of California, in the event that his presence
24 is necessary for a hearing, would likely be outweighed by the costs and
25 difficulties of transporting the records and witnesses to the Central
26 District of California. This is especially true because habeas
27 petitions are often resolved without requiring the petitioner's presence
28 in court. Braden, 410 U.S. at 498. Thus, the Court concludes that this

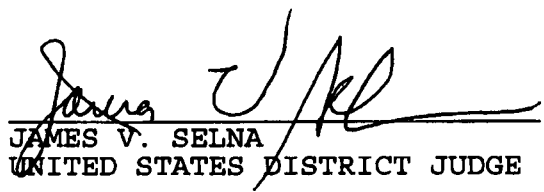
1 action should be brought in the Southern District of California rather
2 than the Central District of California.

3
4 Under 28 U.S.C. § 1404(a), "[f]or the convenience of parties and
5 witnesses, in the interest of justice, a district court may transfer any
6 civil action to any other district or division where it might have been
7 brought." See also Braden 410 U.S. at 497, 499 n.15 (stating that
8 courts can transfer habeas cases to the district of conviction, which is
9 ordinarily the more convenient forum). Accordingly, in the interest of
10 justice, IT IS ORDERED that the Clerk of the Court transfer this matter
11 to the United States District Court for the Southern District of
12 California.

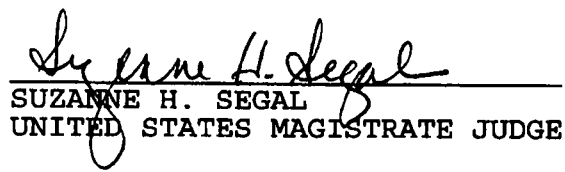
13
14 IT IS FURTHER ORDERED that the Clerk serve a copy of this Order on
15 Petitioner.

16
17
18 IT IS SO ORDERED.

19
20 DATED: 5.30.08.

21
22 
JAMES V. SELNA
UNITED STATES DISTRICT JUDGE

23 PRESENTED BY:

24 
25 SUZANNE H. SEGAL
26 UNITED STATES MAGISTRATE JUDGE
27
28

194, CLOSED, TRANSFERRED

**UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF
CALIFORNIA (Western Division - Los Angeles)
CIVIL DOCKET FOR CASE #: 2:08-cv-02310-JVS-SS**

Javier Espinoza Rodriguez v. John C Marshall
Assigned to: Judge James V. Selna
Referred to: Magistrate Judge Suzanne H. Segal
Cause: 28:2254 Petition for Writ of Habeas Corpus
(State)

Date Filed: 04/08/2008
Date Terminated: 05/30/2008
Jury Demand: None
Nature of Suit: 530 Habeas
Corpus (General)
Jurisdiction: Federal Question

Petitioner**Javier Espinoza Rodriguez**represented by **Javier Espinoza Rodriguez**

CDC V-15361

California Mens Colony East

PO Box 8101

San Luis Obispo, CA 93409-8101

I hereby attest and certify on 6/2/08
that the foregoing document is a full, true
and correct copy of the original on file in
my office, and in my legal custody.

CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Signature]
DEPUTY CLERK



(1098)

PRO SE

V.

Respondent**John C Marshall**

Warden-CMC

Date Filed	#	Docket Text
04/08/2008	<u>1</u>	PETITION for Writ of Habeas Corpus by a Person In State Custody (28:2254) Case assigned to Judge James V. Selna and referred to Magistrate Judge Suzanne H. Segal.(Filing fee \$ 5 DUE.), filed by Petitioner Javier Espinoza Rodriguez. (Attachments: # <u>1</u> Part 1 to Petition# <u>2</u> Part 2 to Petition# <u>3</u> Part 3 to Petition# <u>4</u> Part 4 to Petition# <u>5</u> Part 5 to Petition# <u>6</u> Part 6 to Petition# <u>7</u> Part 7 to Petition# <u>8</u> Part 8 to Petition# <u>9</u> Part 9 to Petition.) (et) (Entered: 04/16/2008)

04/08/2008	<u>2</u>	NOTICE OF REFERENCE TO A U.S. MAGISTRATE JUDGE. Pursuant to the provisions of the Local Rules, the within action has been assigned to the calendar of Judge James V. Selna and referred to Magistrate Judge Suzanne H. Segal to consider preliminary matters and conduct all further matters as appropriate. The Court must be notified within 15 days of any change of address. (et) (Entered: 04/16/2008)
05/30/2008	<u>3</u>	ORDER by Judge James V. Selna transferring case to Southern District of California. Certified copy of the transfer order and docket sheet sent. (MD JS-6. Case Terminated.) (Attachments: # <u>1</u> Letter Transmittal Letter) (esa) (Entered: 06/02/2008)

PACER Service Center			
Transaction Receipt			
06/02/2008 10:58:57			
PACER Login:	us3877	Client Code:	
Description:	Docket Report	Search Criteria:	2:08-cv-02310-JVS-SS End date: 6/2/2008
Billable Pages:	2	Cost:	0.16

[PETITIONER, IN PRO SE]

JAVIER ESPINOZA RODRIGUEZ [CELL # 6147]

NAME

CALIFORNIA MENS COLONY-EAST V-15361

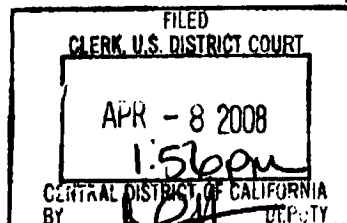
PRISON IDENTIFICATION/BOOKING NO.

P.O. 8101

ADDRESS OR PLACE OF CONFINEMENT

SAN LUIS OBISPO, CA 93409-8101

Note: It is your responsibility to notify the Clerk of Court in writing of any change of address. If represented by an attorney, provide his name, address, telephone and facsimile numbers, and e-mail address.



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JAVIER ESPINOZA RODRIGUEZ,

FULL NAME (Include name under which you were convicted)

Petitioner,

v.

JOHN C. MARSHALL [WARDEN-CMC],

NAME OF WARDEN, SUPERINTENDENT, JAILOR OR AUTHORIZED
PERSON HAVING CUSTODY OF PETITIONER

Respondent.

CASE NUMBER:

CV 08-02310 JVS SS

To be supplied by the Clerk of the United States District Court

☐ AMENDED

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY
28 U.S.C. § 2254

PLACE/COUNTY OF CONVICTION _____
PREVIOUSLY FILED, RELATED CASES IN THIS DISTRICT COURT
(List by case number)

CV _____

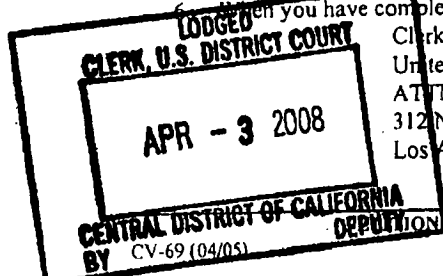
CV _____

INSTRUCTIONS - PLEASE READ CAREFULLY

1. To use this form, you must be a person who either is currently serving a sentence under a judgment against you in a California state court, or will be serving a sentence in the future under a judgment against you in a California state court. You are asking for relief from the conviction and/or the sentence. This form is your petition for relief.
2. In this petition, you may challenge the judgment entered by only one California state court. If you want to challenge the judgment entered by a different California state court, you must file a separate petition.
3. Make sure the form is typed or neatly handwritten. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
4. Answer all the questions. You do not need to cite case law, but you do need to state the federal legal theory and operative facts in support of each ground. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit a legal brief or arguments, you may attach a separate memorandum.
5. You must include in this petition all the grounds for relief from the conviction and/or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.
5. You must pay a fee of \$5.00. If the fee is paid, your petition will be filed. If you cannot afford the fee, you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out and sign the declaration of the last two pages of the form. Also, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account at the institution. If your prison account exceeds \$25.00, you must pay the filing fee.

6. When you have completed the form, send the original and two copies to the following address:

Clerk of the United States District Court for the Central District of California
United States Courthouse
ATTN: Intake/Docket Section
312 North Spring Street
Los Angeles, California 90012



DEPUTY FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY (28 U.S.C § 2254)

PLEASE COMPLETE THE FOLLOWING: (Check appropriate number)

This petition concerns:

1. ☒ a conviction and/or sentence.
2. ☐ prison discipline.
3. ☐ a parole problem.
4. ☐ other.

PETITION

1. Venue

- a. Place of detention: California Men's Colony-East [as addressed-front page].
- b. Place of conviction and sentence: San Diego County Superior Court.

2. Conviction on which the petition is based (a separate petition must be filed for each conviction being attacked).

- a. Nature of offenses involved (include all counts): Attempting to Dissuade a Witness/Reporting a Crime; Car Burglary; Gang-Enhancements; Gun-Enhancements; Carrying Weapon Concealed within Vehicle; Carrying Loaded Firearms; Firearm Used in Crime, and ect.
- b. Penal or other code section or sections: P.C. §§ 136(b)(1); 459 [2nd Degree Vehicle]; 12025(a)(1); 12031(a)(1); ; 186.22 et. seq.; and 12022.5; plus 667(b)-(i).
- c. Case number: SCS176087.
- d. Date of conviction: 8-15-03.
- e. Date of sentence: 10-14-03.
- f. Length of sentence on each count: Count 1: 1-year, 4-months; Count 2: 2x2 [doubled per strike]=4; Count 3: 2x2 [doubled per strike]=4; Count 4: 2x2 [doubled per Strike]=4; Enhancements under Count 2, and Count 2, 4, &
- g. Plea (check one): 5-years=Total 14-years, and 4-months at 85%.

☒ Not guilty☐ Guilty☐ Nolo contendere

h. Kind of trial (check one):

☒ Jury☐ Judge only3. Did you appeal to the California Court of Appeal from the judgment of conviction? ☒ Yes ☐ No

If so, give the following information for your appeal (and attach a copy of the Court of Appeal decision if available):

- a. Case number: DO43198.
- b. Grounds raised (list each):
(1) 10-Grounds+added 3-New Grounds, and additional claims under [IAC]:

Please see extensive Headings within.

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY (28 U.S.C § 2254)

- (2) _____
- (3) _____
- (4) _____
- (5) _____
- (6) _____

c. Date of decision: 5-5-05.

d. Result Affirmed.

4. If you did appeal, did you also file a Petition for Review with the California Supreme Court of the Court of Appeal decision? ☒ Yes ☐ No.

If so give the following information (and attach copies of the Petition for Review and the Supreme Court ruling if available):

a. Case number: S133875. Copy at Exhibits A, & H.

b. Grounds raised (list each):

(1) Please see Exhibits A & H.

(2) Also, please see Exhibit H [behind Post-Card Denial Supreme Ct. [Ca]]: See

(3) Addendum [#2]: GENERALITIES OF THE APPLICABILITIES OF CUNNINGHAM, OF

(4) WHICH VIOLATE THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES

(5) CONSTITUTION.

(6) _____

c. Date of decision: 7-20-05.

d. Result Dismissed Without Prejudice, to re-file according to People v Black:

5. If you did not appeal:

a. State your reasons N/A.

b. Did you seek permission to file a late appeal? ☐ Yes ☒ No

6. Have you previously filed any habeas petitions in any state court with respect to this judgment of conviction?
☒ Yes ☐ No

If so, give the following information for each such petition (use additional pages if necessary, and attach copies of the petitions and the rulings on the petitions if available): All such petitions are parts of this Federal Petition.

a. (1) Name of court: San Diego County Superior Court.

(2) Case number: HSC 10837.

(3) Date filed (or if mailed, the date the petition was turned over to the prison authorities for mailing): 7-11-06.

(4) Grounds raised (list each):

(a) Please see extensive Headings, Grounds, Claims, & Issues within.

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: 8-10-06.

(6) Result Denied, please see Decision within Exhibit F.

(7) Was an evidentiary hearing held? ☐ Yes ☒ No

b. (1) Name of court: Fourth Appellate District, Division One.

(2) Case number: D049739.

(3) Date filed (or if mailed, the date the petition was turned over to the prison authorities for mailing): 10-29-06.

(4) Grounds raised (list each):

(a) Please see infra & supra.

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: On or about March 8, 2007.

(6) Result Denied with written Decision-please see Exhibit G.

(7) Was an evidentiary hearing held? ☐ Yes ☒ No

c. (1) Name of court: The Honorable Supreme Court of the State of California.

(2) Case number: S153884.

(3) Date filed (or if mailed, the date the petition was turned over to the prison authorities for mailing): On or about June 19, 2007.

(4) Grounds raised (list each):

(a) Please infra & supra.

(b) Subsequently to, the Supreme Court's Denial; further arguments regarding: THE APPLICABILITIES OF NUMEROUS STANDARDS OF REVIEWS,

REGARDLESS OF WHICH STANDARD APPLIES: PARTS A-D-attached to pp. 1-33.

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY (28 U.S.C § 2254)

(c) _____

(d) _____

(e) _____

(f) _____

(5) Date of decision: 12-12-07.(6) Result Denied. Please see Exhibit H.(7) Was an evidentiary hearing held? ☐ Yes ☒ No

7. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than five grounds. Summarize briefly the facts supporting each ground. For example, if you are claiming ineffective assistance of counsel, you must state facts specifically setting forth what your attorney did or failed to do.

CAUTION: *Exhaustion Requirement:* In order to proceed in federal court, you must ordinarily first exhaust your state court remedies with respect to each ground on which you are requesting relief from the federal court. This means that, prior to seeking relief from the federal court, you first must present all of your grounds to the California Supreme Court.

- a. Ground one: Please see the attached pleading papers with extensive headings,
ect.

(1) Supporting FACTS: Same.

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☒ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☒ Yes ☐ No

- b. Ground two: Same as above. Due to numerous claims of [IAC] being added after
direct appeal, petitioner filed his Habeas Corpus into the Superior Court,

(1) Supporting FACTS: Same as above.
aAppellate Court, and The Supreme Court.

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☒ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☒ Yes ☐ No

c. Ground three: See above.

(1) Supporting FACTS: See above.

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☒ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☒ Yes ☐ No

d. Ground four: See above.

(1) Supporting FACTS: See above.

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☒ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☒ Yes ☐ No

e. Ground five: See above.

(1) Supporting FACTS: See above.

(2) Did you raise this claim on direct appeal to the California Court of Appeal? ☒ Yes ☐ No

(3) Did you raise this claim in a Petition for Review to the California Supreme Court? ☒ Yes ☐ No

(4) Did you raise this claim in a habeas petition to the California Supreme Court? ☒ Yes ☐ No

8. If any of the grounds listed in paragraph 7 were not previously presented to the California Supreme Court, state briefly which grounds were not presented, and give your reasons: N/A.
- _____
- _____

9. Have you previously filed any habeas petitions in any federal court with respect to this judgment of conviction?
- ☐ Yes ☒ No

If so, give the following information for each such petition (use additional pages if necessary, and attach copies of the petitions and the rulings on the petitions if available):

- a. (1) Name of court: N/A.
- (2) Case number: _____
- (3) Date filed (or if mailed, the date the petition was turned over to the prison authorities for mailing): _____
- (4) Grounds raised (list each):
- (a) _____
- (b) _____
- (c) _____
- (d) _____
- (e) _____
- (f) _____
- (5) Date of decision: _____
- (6) Result _____
- _____
- (7) Was an evidentiary hearing held? ☐ Yes ☐ No

- b. (1) Name of court: N/A.
- (2) Case number: _____
- (3) Date filed (or if mailed, the date the petition was turned over to the prison authorities for mailing): _____
- (4) Grounds raised (list each):
- (a) _____
- (b) _____
- (c) _____
- (d) _____
- (e) _____
- (f) _____
- (5) Date of decision: _____
- (6) Result _____
- _____

(7) Was an evidentiary hearing held? ☐ Yes ☐ No

10. Do you have any petitions now pending (i.e., filed but not yet decided) in any state or federal court with respect to this judgment of conviction? ☐ Yes ☒ No

If so, give the following information (and attach a copy of the petition if available):

(1) Name of court: _____

(2) Case number: _____

(3) Date filed (or if mailed, the date the petition was turned over to the prison authorities for mailing): _____

(4) Grounds raised (list each):

(a) _____

(b) _____

(c) _____

(d) _____

(e) _____

(f) _____

11. Are you presently represented by counsel? ☐ Yes ☒ No

If so, provide name, address and telephone number: _____

WHEREFORE, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding,


Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Executed on

3-27-08

Date


Signature of Petitioner

Name JAVIER ESPINOZA RODRIGUEZ JVS-SS Document 1 Filed 04/08/2008 Page 9 of 50Address CALIFORNIA MEMS COLONY-EAST 6255P.O. BOX 8101SAN LUIS OBISPO, CA 93409-8101CDC or ID Number V-15361

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
(Court)

PETITION FOR WRIT OF HABEAS CORPUS

<u>JAVIER ESPINOZA RODRIGUEZ</u>
Petitioner
vs.
<u>JOHN C. MARSHALL [WARDEN]</u>
Respondent

No. _____
(To be supplied by the Clerk of the Court)

INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies of the petition and, if separately bound, one copy of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and ten copies of the petition and, if separately bound, two copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rule 60 of the California Rules of Court [as amended effective January 1, 2005]. Subsequent amendments to Rule 60 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

Page one of six

Name JAVIER ESPINOZA RODRIGUEZ Case 2:08-cv-02340-JVS-SS Document 1 Filed 04/08/2008 Page 10 of 50Address CALIFORNIA MENS COLONY-EASTP.O. BOX 8101SAN LUIS OBISPO, CA 93409-8101PETITIONER, IN PRO PERCDC or ID Number V-15361F L E D
Stephen M. Kelly, Clerk

NOV - 6 2006

Court of Appeal Fourth District

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

(Court)

PETITION FOR WRIT OF HABEAS CORPUS

JAVIER ESPINOZA RODRIGUEZ,

Petitioner

vs.

JOHN MARSHALL [WARDEN-CMC],

Respondent

No.

D049739

(To be supplied by the Clerk of the Court)

INSTRUCTIONS - READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form *before* answering any questions.
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- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
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- If you are filing this petition in the Court of Appeal, file the original and four copies.
- If you are filing this petition in the California Supreme Court, file the original and thirteen copies.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rules 56.5 and 201(h)(1) of the California Rules of Court (as amended effective January 1, 1999). Subsequent amendments to Rule 44(b) may change the number of copies to be furnished the Supreme Court and Court of Appeal.

Page one of six

Name Case 2:08-cv-02210-JVS-SS Document 1Address California Mens Colony-EastP.O. Box 8101San Luis Obispo, Ca 93409-8101CDC or ID Number V-15361

COPY

Page 11 of 50

IN THE STATE OF CALIFORNIA

IN AND FOR THE SUPERIOR COURT OF SAN DIEGO COUNTY
(Court)

PETITION FOR WRIT OF HABEAS CORPUS

Javier Espinoza Rodriquez	
Petitioner	vs.
John C. Marshall	
Respondent	

No. _____

(To be supplied by the Clerk of the Court)

INSTRUCTIONS—READ CAREFULLY

- If you are challenging an order of commitment or a criminal conviction and are filing this petition in the Superior Court, you should file it in the county that made the order.
- If you are challenging the conditions of your confinement and are filing this petition in the Superior Court, you should file it in the county in which you are confined.
- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the Superior Court, you need file only the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal, file the original and four copies of the petition and, if separately bound, one copy of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and ten copies of the petition and, if separately bound, two copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.
- In most cases, the law requires service of a copy of the petition on the district attorney, city attorney, or city prosecutor. See Penal Code section 1475 and Government Code section 72193. You may serve the copy by mail.

Approved by the Judicial Council of California for use under Rule 60 of the California Rules of Court [as amended effective January 1, 2005]. Subsequent amendments to Rule 60 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

Page one of six

This petition concerns:

- ☒ A conviction ☐ Parole
☒ A sentence ☐ Credits
☐ Jail or prison conditions ☐ Prison discipline

☒ Other (specify): Enhancements under Penal Code § 186.22 et. seq.; and § 2933.1=85% Loss credit.

1. Your name: Javier Espinoza Rodriguez
 2. Where are you incarcerated? California Mens Colony-East
 3. Why are you in custody? ☒ Criminal Conviction ☐ Civil Commitment

Answer subdivisions a. through i. to the best of your ability.

- a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").
Attempting to Dissuade a Witness/Reporting a Crime; Car Burglary; and Gang-Enhancements, Gun-Enhancement under the[STEP-ACT]; ect.; please see within for additional offenses.
 b. Penal or other code sections: P.C., §§ 136.1(b)(1); 459; 1205(a)(1); 12031(a)(1); 186.22et. seq.; and 12022.5; ect.; please see within for additional offenses.
 c. Name and location of sentencing or committing court:
THE SUPERIOR COURT OF SAN DIEGO COUNTY, IN AND FOR THE STATE OF CALIFORNIA.
 d. Case number: SCS176087.
 e. Date convicted or committed: 8/15/03.
 f. Date sentenced: 10/14/03.
 g. Length of sentence: 14-years, and 4-months at 85%.
 h. When do you expect to be released? 2015-approximately.
 i. Were you represented by counsel in the trial court? ☒ Yes. ☐ No. If yes, state the attorney's name and address:
Benjamin Sanchez: #85 Third Ave, Chula Vista, Ca 91910

4. What was the LAST plea you entered? (check one)

- ☒ Not guilty ☐ Guilty ☐ Nolo Contendere ☐ Other: _____

5. If you pleaded not guilty, what kind of trial did you have?

- ☒ Jury ☒ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

Ground 1: State briefly the ground on which you base your claim for relief. For example, "the trial court imposed an illegal enhancement." (If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page four. For additional grounds, make copies of page four and number the additional grounds in order.)

Please see attached Grounds (1)-(13), pages 1-33.

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts upon which your conviction is based. If necessary, attach additional pages. CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is: *who* did exactly *what* to violate your rights at *what time (when)* or *place (where)*. (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)

Please see attached Grounds (1)-(13), pages 1-33.

b. Supporting cases, rules, or other authority (optional):

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

"Same as above".

7. Ground 2 or Ground 3 ^X ^{if applicable} ~~Ground 2~~ Case 2:08-cv-02310-JVS-SS Document 1 Filed 04/08/2008 Page 14 of 50
Please see attached Grounds (1)-(13), pages 1-33.

a. Supporting facts:

"Same as above".

b. Supporting cases, rules, or other authority:

"Same as above".

8. Did you appeal from the conviction, sentence, or commitment? ☒ Yes ☐ No. If yes, give the following information:
- a. Name of court ("Court of Appeal" or "Appellate Dept. of Superior Court"): Court of Appeals, Fourth District, Division One, 750 "B" Street, Suite 300
San Diego, Ca 92101
- b. Result Affirmed
- c. Date of decision: April 5, 2005
- d. Case number or citation of opinion, if known: No. D043198
- e. Issues raised: (1) (1)-(10) Issues: Please see Petitioner's Petition for Review-Exhibit A.
" "
(2) " "
(3) " "
- f. Were you represented by counsel on appeal? ☒ Yes ☐ No. If yes, state the attorney's name and address, if known:
Robert L. Swain: 964 Fifth Ave., Suite 214, San Diego, Ca 92101
9. Did you seek review in the California Supreme Court? ☒ Yes ☐ No. If yes, give the following information:
- a. Result Dismissed Without Prejudice, to re-file.
- b. Date of decision: July 20, 2005-Exh. A-end
- c. Case number or citation of opinion, if known: S133875
- d. Issues raised: (1) "Same as the above."
(2) " "
(3) " "
10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:
Ineffective Assistance of Counsel-Please see Issues (1)-(13)-this Petition.
11. Administrative Review:
- a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500 [125 Cal.Rptr. 286].) Explain what administrative review you sought or explain why you did not seek such review:

- b. Did you seek the highest level of administrative review available? ☐ Yes ☐ No.
Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction? E (If yes, continue with number 13. If no, continue to number 15.)

13. a. (1) Name of court: _____
- (2) Nature of proceeding (for example, "habeas corpus petition"): _____
- (3) Issues raised: (a) _____
- (b) _____
- (4) Result (Attach order or explain why unavailable): _____
- (5) Date of decision: _____
- b. (1) Name of court: _____
- (2) Nature of proceeding: _____
- (3) Issues raised: (a) _____
- (b) _____
- (4) Result (Attach order or explain why unavailable): _____
- (5) Date of decision: _____

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

N/A: Investigation into additional meritable claims & issues; and to Federalize old & new claims and issues.

16. Are you presently represented by counsel? ☒ Yes. ☐ No. If yes, state the attorney's name and address, if known:

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes. ☒ No. If yes, explain:

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

N/A.

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date:

7-11-06


(SIGNATURE OF PETITIONER)

Page six of six

12. Other than direct appeal, have you filed other petitions, applications, or motions for this conviction, commitment, or issue in any court? ☒ Yes. If yes, continue with number 13. ☐ No. If no, skip to number 15.

13. a. (1) Name of court: Superior Court, County of San Diego

(2) Nature of proceeding (for example, "habeas corpus petition"): Habeas Corpus-Petition for Writ.

(3) Issues raised: (a) Please see Petition-attached MEMORANDUM OF POINTS AND AUTHORITIES and CLAIMS AND ISSUES.

(b) _____

(4) Result (Attach order or explain why unavailable): Court's Denial and Petitioner's Rebuttal-attached as EXHIBIT F.

(5) Date of Decision: August 10, 2006.

b. (1) Name of court: _____

(2) Nature of proceeding: _____

(3) Issues raised: (a) _____

(b) _____

(4) Result (Attach order or explain why unavailable): _____

(5) Date of Decision: _____

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

N/A.

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34Cal.2d 300, 304.)

N/A.

16. Are you presently represented by counsel? ☐ Yes. ☒ No. If yes, state the attorney's name and address, if known:

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes. ☒ No. If yes, explain:

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

N/A.

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: 10-29-06

[Signature]
(SIGNATURE OF PETITIONER)

Page six of six

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 12. Other than direct appeal, have you filed any petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? ☒ Yes. If yes, continue with number 13. ☐ No. If no, skip to number 15.

13. a. (1) Name of court: _____
 (2) Nature of proceeding (for example, "habeas corpus petition"): _____
 (3) Issues raised: (a) _____
 (b) _____
 (4) Result (Attach order or explain why unavailable): _____
 (5) Date of decision: _____
- b. (1) Name of court: IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE, DIVISION ONE
 (2) Nature of proceeding: Petition for Writ of Habeas Corpus
 (3) Issues raised: (a) Please see Petition and it's attached MEMORANDUM OF POINTS AND AUTHORITIES and CLAIMS AND ISSUES.
 (b) _____
 (4) Result (Attach order or explain why unavailable): Court's Denial and Petitioner's Rebuttal-within the separately bound exhibits.
 (5) Date of decision: March 8, 2007.

c. For additional prior petitions, applications, or motions, provide the same information on a separate page.

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:
N/A.

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)
N/A.

16. Are you presently represented by counsel? ☐ Yes. ☒ No. If yes, state the attorney's name and address, if known:

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes. ☒ No. If yes, explain:

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:
N/A.

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date:

6-10-07

[Signature]
 (SIGNATURE OF PETITIONER)

Page six of six

EXPANSION PLUS FEDERALISM OF OLD
ISSUES FOR STATE EXHAUSTION AND
ADDENDUM OF NEW ISSUES
AND CLAIMS

INTRODUCTION:

The expansion of all issues are based mainly on the boot-strapping of issues to claims of ineffective assistance of trial counsel, in the first instance. Plus, as all arguments will show, additional claims of Due Process and Equal Protection will also be added for the purpose of federalization of all issues within Petitioner's (PETITION FOR REVIEW[postly filed, but denied without prejudice by our Honorable California Supreme Court pending the outcome of People v. Black(2005) 35 Cal.4th 1238 regarding the effect of Blackly v. Washington(2004) 542 U.S.296, 124 S.Ct. 2531, and United States v. Booker(2005) 543 U.S. ___, 125 S.Ct. 738; on California Law].) (Please see EN BANC hearing denial-attached hereto back of Petition, as Exhibit A.)

THE EXPANSION PLUS FEDERALISM
OF ALL ISSUES TO CLAIMS FOR STATE EXHAUSTION

ISSUES AND CLAIMS PRESENTED:

- I. REVIEW SHOULD BE GRANTED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO REPLACE A JUROR WHO WAS UNABLE TO UNEQUIVOCALLY STATE THAT SHE WOULD DECIDE THE CASE BY REFERENCE EXCLUSIVELY TO THE LAW AND THE EVIDENCE/DENIAL OF DUE PROCESS, EQUAL PROTECTION OF THE LAW AND INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION
- II. THE PETITION FOR REVIEW SHOULD BE GRANTED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH MR. RODRIGUEZ ATTEMPTED TO DISSUADE A WITNESS/DENIAL OF DUE PROCESS, EQUAL PROTECTION OF THE LAW, AND INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION
- III. REVIEW SHOULD BE GRANTED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH BEYOND A REASONABLE DOUBT THAT THE OFFENSES WERE COMMITTED FOR BENEFIT OF, AT THE DIRECTION OF, OR IN ASSOCIATION WITH ANY CRIMINAL STREET GANG/DENIAL OF DUE PROCESS, EQUAL PROTECTION OF THE LAW, AND INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION
 - A. The Evidence Is Insufficient to Establish That "Sidro" Is a Criminal Street Gang
 - B. The State Presented Insufficient Evidence that Any Of The Offenses Were Committed For The Benefit Of, At The Direction Of, And In Association With A Criminal Street Gang With The Specific Intent To Promote, Further And Assist In Criminal Conduct By Gang Members

IV. REVIEW SHOULD BE GRANTED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH BEYOND A REASONABLE DOUBT THAT MR. RODRIGUEZ WAS AN ACTIVE PARTICIPANT OF A CRIMINAL STREET GANG/DENIAL OF DUE PROCESS, EQUAL PROTECTION AND INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

V. REVIEW SHOULD BE GRANTED BECAUSE MARTINEZ'S TESTIMONY REGARDING THE ALLEGED STATEMENTS MADE BY OFFICERS ABOUT FIELD INTERVIEWS IS VIOLATIVE OF MR. RODRIGUEZ'S SIXTH AMENDMENT RIGHT TO CONFRONTATION/DUE PROCESS, AND EQUAL PROTECTION OF THE LAW UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

VI. REVIEW SHOULD BE GRANTED BECAUSE THE TRIAL COURT ERRED BY ALLOWING IMPROPER PRIOR ACT EVIDENCE THAT PREJUDICED THE DEFENDANT'S RIGHT TO A FAIR TRIAL/DENIAL OF DUE PROCESS, EQUAL PROTECTION AND INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

VII. REVIEW SHOULD BE GRANTED BECAUSE THE COURT ERRED IN FAILING TO GIVE A LESSER INCLUDED OFFENSE INSTRUCTIONS FOR COUNTS THREE AND FOUR/DENIAL OF DUE PROCESS, EQUAL PROTECTION UNDER THE LAW AND INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

VIII. REVIEW SHOULD BE GRANTED BECAUSE THE IMPOSITION OF CONSECUTIVE SENTENCES BASED ON JUDICIAL FACT FINDING IS VIOLATIVE OF THE SIXTH AMENDMENT

IX. REVIEW SHOULD BE GRANTED BECAUSE THE COURT ABUSED ITS DISCRETION IN FAILING TO DISMISS THE STRIKE PRIOR/DENIAL OF DUE PROCESS, EQUAL PROTECTION OF THE LAW AND INEFFECTIVE ASSISTANCE OF COUNSEL, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

X. REVIEW SHOULD BE GRANTED BECAUSE THE ERRONEOUS JURY INSTRUCTION ON THE GANG ENHANCEMENT MANDATES REVERSAL BECAUSE IT MISLED THE JURY AS THE BURDEN OF PROOF AND THE ELEMENTS OF THE ENHANCEMENT/DENIAL OF DUE PROCESS, EQUAL PROTECTION AND INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

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- XI. EXCESSIVE FINES/RESTITUTION ORDERS BY THE TRIAL COURT ASSESSED AGAINST PETITIONER IN EXCESS OF THE COURT'S JURISDICTION AND LIKENING THE ORDER TO AN UNAUTHORIZED SENTENCE
- XII. REVERSAL SHOULD BE GRANTED BECAUSE PETITIONER'S CONVICTION UNDER PENAL CODE, SECTION 186.22 ET. SEQ. [CALIFORNIA'S GANG ENHANCEMENT LAWS] IS UNCONSTITUTIONAL AND IN EXCESS OF THE COURT'S JURISDICTION, OF WHICH, PROVIDED A DENIAL OF DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW, ALL UNDER THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION
- XIII. REVERSAL SHOULD BE GRANTED BECAUSE THE COMBINATION OF NUMEROUS EVIDENTIARY ERRORS CAUSED THE TOTALITY OF CIRCUMSTANCES, OF WHICH, CONSTITUTED A DEPRIVATION OF SUBSTANTIVE DUE PROCESS DURING THE TRIAL COURT PROCEEDINGS

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MEMORANDUM OF DECISION AND
AUTHORITIES IN SUPPORT THEREOF

2 I. REVIEW SHOULD BE GRANTED BECAUSE THE TRIAL COURT
3 ABUSED ITS DISCRETION WHEN IT FAILED TO REPLACE A
4 JUROR WHO WAS UNABLE TO UNEQUIVOCALLY STATE THAT
5 SHE WOULD DECIDE THE CASE BY REFERENCE EXCLUSIVELY
6 TO THE LAW AND THE EVIDENCE/DENIAL OF DUE PROCESS,
7 EQUAL PROTECTION OF THE LAW AND INEFFECTIVE ASSISTANCE
8 OF COUNSEL UNDER THE FIFTH, SIXTH AND FOURTEENTH
9 AMENDMENTS TO THE UNITED STATES CONSTITUTION

10 Incorporated by reference[Petitioner's PETITION FOR REVIEW, ISSUE I.,
11 pages 8-11, Exhibit A]. In addition, Petitioner claims denial of Due Process,
12 Equal Protection under the law and Ineffective assistance of counsel: Under
13 the Fifth, Sixth and Fourteenth Amendments to the United States Constitution,
14 respectively-as referenced above and articulated below. The Introduction,
15 Statement of Issues Presented for Review, Necessity for Review, Statement of
16 the Case, Statement of Facts, and Argument, the procedural background
17 assessments are contained within[Petitioner's PETITION FOR REVIEW, pages 1-8].

18 As stated in (Issue I.[i.e., references to Issues within Petitioner's
19 PETITION FOR REVIEW]), the trial court abused it's discretion by not removing
20 Juror #7, when that Juror unequivocally stated she was fearful for her and her
21 familie's lives, because of retaliation from the Defendant's. Ergo, Juror #10
22 also stated concerns about his and his familie's lives. [R.T.A. 157-174.]
23 However, the trial court ruled to excuse Juror #10. [R.T.A. 173; line 14.]
24 Apparently, the trial court determined that Juror #10 would always have the
25 thought of retaliation in the back of his mind; therefore, the Judge excused
26 him, a sound and reasonable determination. However, even with Defense
27 Counsel's and the District Attorney's stipulation to excuse Juror #7, the
28 Judge refused to excuse her; even though she had verbalized the identical
concerns for her and her familie's safety. [R.T.A. 159; 1-4.] Just because she
did not express herself as well as Juror #10 about the fear of retaliation
remaining in the back of his thoughts, that concern for Juror #7, she could
not automatically delete that concern out of her thoughts or mind. It would
remain there throughout the proceedings, thereby, an extraneous influence that

1 effected her verdict, she should put these Defendants away in prison.
2 along, long time, that way they cannot get to me or my family. That, of
3 course, is what we all would be thinking; that or the opposite, of which we
4 can reasonable deduce did not happen because, she would have voted to find
5 Defendants not guilty, and that did not happen.

6 The United States Supreme Court has ruled on this Extraneous Influences
7 upon jurors. In Remmer v. United States, 347 U.S. 227(1954): Extraneous
8 influences not only include juror contact with other people, but also juror
9 contact with evidence, and other extrinsic materials. In the event that a
10 juror is exposed to extraneous influences, the trial court "should determine
11 the circumstances, the impact thereof upon the juror, and whether or not it
12 was prejudicial, in a hearing with all interested parties permitted to
13 participate." (Citing Remmer, supra, 347 U.S. at 230.)

14 Although, it is true that the trial court conducted a hearing with all
15 interested parties, it abuse it's discretion by not considering the prejudice
16 already attached to the tainted proceedings: "Juror No. 7 : SURE, I GUESS IT
17 COULD BE. LIKE I SAID, I GUESS MY FEAR WOULD BE, EASILY PUT, WOULD BE FEAR OF
18 RETALIATION ONE WAY OR ANOTHER." (R.T.A. 159; 1-4.) Both parties believed that
19 therefore, Juror #7 had serious prejudicial extraneous influences of gang
20 retaliation against her and her family. This obviously tainted her judgment to
21 and caused her to find Defendants guilty for the sake of protecting her family
22 and herself; after-all, the trail judge wouldn't even protect her and her
23 family by excusing her, post to her admitting her fear of retaliation, of
24 which, was apparently, very difficult for her to do on the record. [R.T.A.
25 157-161.]

26 Therefore, all the above and the herein, in incorporated references above,
27 are violations of Petitioner's Due Process, Equal Protection, and ineffective
28 assistance of trial counsel for not objecting to the abuse of discretion by
the Judge and counsel failed/refused to file a formal motion including cites
to authority on point. For obviously, since Juror #10 was allowed to be

1 excluded by the Court. Juror #7, and impartial trial would call that Juror #7
2 be allowed to be excluded also. The Deputy District Attorney [Sophia
3 Roach] stipulated to the exclusion of Juror #7; therefore, she could see for
4 herself the prejudicial affect/effect that could and did taint the fairness of
5 the trial proceedings. No reason to rebut Co-defendant's motion to excuse
6 Juror #7, because prejudice was presumed-already attached.

7 Under the Fifth, Sixth and Fourteenth Amendments to the United States
8 Constitution.

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II. THE PETITION FOR REVIEW SHOULD BE GRANTED BECAUSE
THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH
MR. RODRIGUEZ ATTEMPTED TO DISSUADE A WITNESS/DENIAL
OF DUE PROCESS, EQUAL PROTECTION OF THE LAW
AND INEFFECTIVE ASSISTANCE OF COUNSEL
UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS
TO THE UNITED STATES CONSTITUTION

Incorporated by reference[PETITIONER'S PETITION FOR REVIEW, ISSUE II.,
pages 11-14, Exhibit A]. In addition, Petitioner claims denial of Due
Process, Equal Protection under the law and Ineffective Assistance of Counsel:
under the Fifth, Sixth and Fourteenth Amendments to the United States
Constitution-as referenced above and articulated below.

The only testimony regarding this Issue of Dissuading a Witness, is
Martin Herrera's[contained within (R.T. 159-197)]of which, does not prove the
elements beyond a reasonable doubt. Yes, there was a shot fired by Petitioner,
however, this shot was just to show-off, not to dissuade any witness or
witnesses. Accordingly, even to Mr. Herrera's testimony[see (R.T. 180-186)]the
suspects were told way before the shot was ever fired that they were calling
the Police. The Petitioner never heard that statement or pointed the gun at
anyone or anything, he only fired up into the sky. According to all the
witnesses testimony, none of them ever saw a gun, were never threatened by the
gun or even a statement (i.e., don't call the Police or we will...). There was
no evidence whatsoever, to show that Petitioner threatened them; only by the
sequence of events does the jury assume that since the shot happened
subsequently to, someone saying they were going to call the Police, that he
was guilty of Dissuading a Witness.

A petitioner may challenge a state court verdict on the grounds that
there was insufficient evidence to support the conviction. In reviewing such
an argument, a state court or federal court must decide whether there was
sufficient evidence for a rational trier of fact to find the petitioner's
guilt beyond a reasonable doubt of the elements of the criminal offense as
defined by the state criminal codes. Jackson v. Virginia(1979) U.S. 307,
318-19[90 S.Ct. 2781; 61 L.Ed.2d 560]. Please compare[PETITIONER'S PETITION
FOR REVIEW, ISSUE II, pages 11-14], regarding (P.C., § 136.1, subdivision

and Equal Protection under the law.

Additionally, Petitioner's trial counsel failed/refuse to object to any of the testimony regarding this issue. Failed/refused to offer any expert testimony to offset the witnesses testimony, to even ask the witnesses point-blank[Did you ever feel you were being dissuading from calling the Police?]. Never requested a direct verdict in this regard or file a motion. His pre-trial investigation and preparation was totally ineffective. Did not even attempt to adequately test the Prosecution's Case-as stated infra and supra-as within the meaning of-(Cronic v. United States[1984] 466 U.S. 684, 655[L.Ed.2d 657, 104 S.Ct. 2039])).

[The Issues of III.-V., and their headings are quoted above in ISSUES AND CLAIMS PRESENTED.]

Incorporated by reference[Petitioner's PETITION FOR REVIEW, ISSUES III.-V., pages 14-28, Exhibit A-and those applicable HEADINGS]. In addition, Petitioner claims denial of Due Process, Equal Protection under the law and Ineffective Assistance of Counsel: Under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, respectively-as referenced above and articulated below.

Thus, in addition to the arguments in[ISSUES III.-V.]Petitioner claims an overall prejudicial effect ineffectuated the jury's mind as a whole and caused an unfair trial, ergo an impartial verdict. As stated herein, and incorporated with those[ISSUES III.-V.], without this overall tainting, the verdict of the jury would have favored Petitioner. Gang-affiliation evidence admitted to show bias or identity is cumulative and prejudicial:

It is well established that even where a defendant is known or proven to be a gang member, evidence of that gang membership too often leads to the impermissible inference that the defendant is guilty by virtue of his membership in a gang (People v. Cardenas[1982] 31 Cal.3d 897, 904-905, 184

Cal.Rptr. 165, 647 P.2d 569["there was a real danger that the jury would improperly infer that appellant had a criminal disposition because...appellant was a member of the Flores gang."]; People v. Perez (1981) 114 Cal.App.3d 470, 479, 170 Cal.Rptr. 619["The word gang...connotes opprobrious implications...[and]takes on a sinister meaning...to the prejudice of the defendant."]). The Court of Appeal in People v. Maestas(1993) 20 Cal.App.4th 1482, 1495, 25 Cal.Rptr.2d 644, in reversing a conviction due to the improper introduction of gang membership.

As the court concluded in People v. Maestas (1993),supra, 20 Cal.App.4th 1482, 1497-1498, 25 Cal.Rptr.2d 644: "[E]ven when offered to buttress identification, the prejudicial effect may be too great. (People v. Perez (1981) 114 Cal.App.3d 470 [170 Cal.Rptr. 619].) As the Perez[italics omitted]court noted: 'It is fair to say that when word gang[quotation marks omitted]is used in Los Angeles County, one does not have visions of the characters from the 'Our Little Gang' series. The word gang...connotes opprobrious implications...[T]he word 'gang' takes on a sinister meaning when it is associated with activities'".

Our Supreme Court has observed that "...evidence of common gang membership...is arguably of limited probative value while creating a significant danger of unnecessary prejudice."

Accordingly, to the case at bar, Petitioner's trial was infected with this unnecessary prejudice due to the Trial Court's rulings, the prosecutors misquotes and the failure/refusal of trial counsel to object to such.

The Trial Court-even with objections from the Petitioner's Co-Defendant's Counsel[Mr. Leahy]-made the erroneous ruling upon the Deputy District Attorney's[Sophia Roach]off point authorities regarding the above prejudicial effect and using Defendants' priors as predicate acts to prove the gang enhancements against the Petitioner. [R.T. 5-36.]

This is clearly abuse of discretion by the Trial Court and Prosecutorial Misconduct by the (D.D.A.), for she blatantly introduced proffered authority

Petitioner's Counsel [Mr. Sanchez] failed/refused to object to the above, in anyway or matter regarding the introduction of this very prejudicial material against the interest of his client. [R.T.A. 2-3; 10; 14: 6-7; 14: 8-15; and 22: 1-8.] He could not come up with any case cites on point-even with days to do the research-and therefore, could not offer a sustainable objection to the Prosecution's Case. Compare above case-cites and years derived, trial counsel could have discovered with very little effort.

Also, according to the ruling of the Trial Court and all other parties, that ruling was only made against Petitioner's Co-Defendant, not Petitioner. [R.T. 17: 1-17.]

Allowing Petitioner's Prior as a predicate and for impeachment purposes was of proportional Constitutional Error. If a prior conviction is an element of the charged offense, as it was here, Article I, § 28(f) of the California Constitution (Proposition 8) requires that "When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court. "The jury must be advised of the fact of the prior conviction, but not of its nature if the defendant stipulates to his status as a prior offender. The California Supreme Court has held that Art. I, § 28(f), permits disclosure of stipulated ex-felon status to a jury trying a charge as a violation of Pen C § 12021 because that status is an element of the offense. However, Art. I, § 28(f) "does not require the nature of prior convictions to go to the jury in such case, since that information is utterly irrelevant to the charge. Disclosure of the nature of the priors remains error in post-Proposition 8 trials" (People v. Valentine [1986] 42 Cal.3d 170, 181-182, 228 Cal.Rptr. 25, 720 P.2d 913).

Thus, if the defendant offers to stipulate to the prior conviction allegation which is an element of the offense, the jury will be informed that the defendant is an "ex-felon" or has been convicted of one of the offenses listed as an element in the charged offense, but will not be informed of the

Case 2:08-cv-02310-JVS-SS Document 1 (1992) App. 4th 1699, 1701-1702, 13 Cal.Rptr.2d 451]. (See California Jury Instruction Criminal [6th ed.] No. 12:44 for example.)

The Petitioner's Counsel stipulated to that, but still during the Trial Court's Proceedings the prior's nature was shown; this, evidently was used as a predicate for the new offense, the gang enhancement and as a prior strike, for the purpose of the Three-strike Law[to double Petitioner's sentence and to only allow 20% reduction credits upon his sentence]. [R.T. 1-36.]

And for impeachment purposes[R.T. 4: 3-16], of which, Petitioner's Counsel submitted to the use. [R.T. 4: 12.] Thus, not only did these uses violate the California Constitution, but the United States Constitution of denial of Due Process, Equal Protection under the law and the right to effective assistance of counsel[see corresponding Amendments above-each HEADINGS]. The Trial Court Proceedings, the Statutes, and related Constitutionally protected parts were violated and therefore, violations of Proportional U.S. Constitutional errors of, unnecessary prejudice. A federal petition for writ of habeas corpus will be granted only where a state's violations of its own evidentiary rules results in denial of federal fairness. Estelle v. McGuire (1991) 502 U.S. 62, 70[112 S.Ct. 475, 481; 116 L.Ed.2d 385]. There can be a denial of fundamental fairness if there was a single grossly prejudicial evidentiary ruling or if there were numerous evidentiary errors that the totality of circumstances constituted a deprivation of substantive due process. Just as due process can be violated when states fail to follow their own administrative regulations, due process is violated when a state fails to follow its own established criminal procedure and violates its own statutes or constitution. Hicks v. Oklahoma (1980) 447 u.s. 343[100 S.Ct. 2227; 65 L.Ed.2d 175].

Due to the above and below, the failure of the Trial Court to follow those procedural rules, have impacted the criminal proceedings of Petitioner. Hill v. United States (1962) 368 U.S. 424[82 S.Ct. 468; 7 L.Ed.2d 417].

Combined, also with, the Prosecution's only witness, gang banger,

alleged statements made, the elements of the gang enhancements, and the very insufficient evidence proffered to prove[that any of the offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members]: And that, the Petitioner was an active participant of a criminal street gang, all beyond a reasonable doubt.

Due to the presentation of, and the testimony of Mr. Martinez[the Prosecution's Expert on Gangs]might have dazzled the jury; thereby, actually fooling the jury, the Petitioner's Co-Defendant's Counsel knew better. [R.T. 341-370-Mr. Martinez' testimony.] This testimony was, in of it self, did not prove the elements within any of the gang allegations. this testimony violated Petitioner's Due Process and Equal protection by being so vague and overboard. He definitely could not testify to Petitioner's state of mind, to him being an active participant of a criminal street gang or that any of the offenses were committed for the benefit of, ect. ect. [R.T. 366-369.] (People v. Killebrew (2003) 103 Cal.App.4th 644, 657-657, and cites above.) This caused the jury to find Petitioner guilty beyond unreasonable doubt, by using tainted and unreliable testimony based on disputed material facts.

And that testimony had an impacted effect upon the jury's deliberations, in addition to the above; Petitioner's Confrontation Clause was violated due to the hearsay testimony, that of, Mr. Martinez, and the court and defense counsel allowing-the use of his and others-field interviews, tainted by hearsay. (Crawford v. Washington [2004] 124 S.Ct. 1354, 1364.)

Generally, a prisoner must be able to show "actual prejudice," in other words, the court must be able to find that the error had substantial and injurious effect or influence in determining the jury's verdict. Bains v. Cambra (9th Cir. 2000) 204 F.3d 964; see also Kotteakos v. United States (1946) 328 U.S. 750[66 S.Ct. 1239]; Brecht v. Abrahamson (1993) 507 U.S. 619[113 S.Ct. 1710; 123 L.Ed.2d 353]. The burden of proof is on the state to

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show that an error did not substantially influence the jury's decision and

doubt should be resolved in favor of the petitioner. O'Neal v. McAninch (1995) 513 U.S. 432[115 S.Ct. 992; 130 L.Ed.2d 947]. However, in some circumstances—for example, where a jury instruction might have allowed the jury to convict on evidence amounting to less than proof beyond a reasonable doubt—the conviction will automatically be reversed without any need to show prejudice. Sullivan v. Louisiana (1993) 508 U.S. 275[113 S.Ct. 2078; 128 L.Ed.2d 182]; Arizona v. Fulminate (1991) 499 U.S. 279, 331[111 S.Ct. 1246; 113 L.Ed.2d 302](giving examples of structural defects); Ramirez v. Hatcher (9th Cir. 1998) 136 F.3d 1209.

Petitioner's Trial Counsel failed/refused to produce any expert testimony or any witnesses to contradict the Prosecution's Expert Gang testimony. The right to counsel includes the right to the use of experts such as psychiatrist or psychologists or any other expert that will assist counsel in preparing a defense. Confidence in our criminal justice system rests in its adversarial components. Glasser v. U.S. (1942) 315 U.S. 60, 71[62 S.Ct. 457]; 86 L.Ed. 680. One of these adversarial components is counsel's preparation for trial. To hire competent expert witnesses to counter the prosecution's case in chief. In Petitioner's case to counter Mr. Martinez's testimony regarding the elements to allegations of gang enhancements. A reasonable competent person, knowing that Mr. Martinez was scheduled to testify for the prosecution, would have prepared for such, ahead of trial; thereby, having hired experts to testify in defense's behalf. (Please see Cronic, cited above.)

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VI. REVIEW SHOULD BE GRANTED BECAUSE THE TRIAL COURT
ERRED BY ALLOWING IMPROPER PRIOR ACT EVIDENCE THAT
PREJUDICED THE DEFENDANT'S RIGHT TO A FAIR TRIAL/
DENIAL OF DUE PROCESS, EQUAL PROTECTION AND INEF-
FECTIVE ASSISTANCE OF COUNSEL UNDER THE FIFTH, SIXTH AND
FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Incorporated by reference[Petitioner's PETITION FOR REVIEW, ISSUE VI., pages 28-29, Exhibit A]. In addition, Petitioner claims denial of Due Process, Equal Protection under the law and Ineffective Assistance of Counsel. Under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, respectively-as referenced above and articulated below. The Introduction, Statement of Issues Presented for Review, Necessity for Review, Statement of the Case, Statement of the Facts, and Argument, the procedural background assessments are contained within[Petitioner's PETITION FOR REVIEW, pages 1-8].

As stated in (Issue VI., referenced to Issues within Petitioner's PETITION FOR REVIEW)], the trial court erred in allowing the state to present evidence of a prior conviction by Mr. Rodriguez. [R.T. 358.] See the rest of argument in the above incorporated-pages 28-29. However, this was ruled earlier on by the court that this prior would only be used to impeach Petitioner if he chose to testify. [R.T. 4.] Also, see above arguments in[ISSUES III.-V.], because, those arguments are interwoven with the issue here. [R.T. 5: 15-28; 6-16.] And Mr. Rodriguez's prior was not to be brought in under (Evidence Code, § 1101[b]) either. [R.T. 16:21-28; and 17:1-6.]

Thus, denial of Due Process and Equal Protection under the law. The California Court's of Appeals decision was therefore, contrary to and an unreasonable application of Supreme Court standard of review regarding these two constitutional violations. See Court of Appeal's Opinion-herein after referred to as [Opn pp. 28-32-attached as Exhibit B]. The Court stated: "Finally, we do not reach Rodriguez's conclusory argument that admission of his prior conviction violated his due process right to a fair trial. First, he does not specify how, or in what manner, his due process right is implicated." [Opn p. 30.] However, he

has articulated numerous reasons that specify why these rights were violated as incorporated above, and this is dispositive of this issue due to the substantial influence upon the jury's decision. (Jackson v. Virginia, supra[1979]) 443 U.S. 307, 318-19[90 S.Ct. 2781; 61 L.Ed.2d 560]; insufficient evidence.)

Generally, a federal prisoner must be able to show "actual prejudice," in other words, the court must be able to find that the error had substantial and injurious effect or influence in determining the jury's verdict. Bains v. Cambra(9th Cir. 2000) 204 F.3d 964; see also Kotteakos v. United States(1946) 328 U.S. 750[66 S.Ct. 1239]; Brecht v. Abrahamson(1993) 507 U.S. 619[113 S.Ct. 1710; 123 L.Ed.2d 353]. The burden of proof is on the state to show that an error did not substantially influenced the jury's decision, and doubt should be resolved in favor of the petitioner. O'Neal v. McAninch(1995) 513 U.S. 432[115 S.Ct. 992; 130 L.Ed.2d 947]. However, in some circumstances—for example, where amounting to less than proof beyond a reasonable doubt—the conviction will automatically be reversed without any need to show prejudice. Sullivan v. Louisiana(1993) 508 U.S. 275[113 S.Ct. 2078; 128 L.Ed.2d 182]; Arizona v. Fulminante(1991) 499 U.S. 279, 331[111 S.Ct. 1246; 113 L.Ed.2d 302](giving examples of structural defects); Ramirez v. Hatcher(9th Cir. 1998) 135 F.3d 1209.

Petitioner's trial counsel failed/refused to object to, or research these issues involved; to even know if he could object, on what grounds[foundations] and when. [R.T. 14:7; 14:15; and 22:7-8.] Here is one example of his incompetence and providing ineffective assistance of counsel: Petitioner's counsel failed/refused to object to the erroneous admission of evidence based on the scope of Martinez's[the Prosecution's-Gang Expert], testimony[informed speculation, of which amounted to his opinion], that the Petitioner's crimes were committed to benefit, promote or assist the street-gang he used to belong to. However, Petitioner himself testified that he no longer associated with them, that he married, had children and went to work faithfully. [Opn pp. 19-22.] Court Appeals' Opinion of waiver of objection and forfeiture.

This example also corresponds to[improper prior conviction

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evidence] introduced by the Prosecution, allowed by the [part omitted] establishing
to by Defense Counsel: "[e]vidence of a prior conviction [part omitted] establishing
that 'Sidro' was a criminal street gang and that Mr. Rodriguez was an active
participant of the 'Sidro' gang." [Opn p. 29; and Petitioner's PETITION FOR REVIEW,
ISSUE VI., at pp. 28-29.] (Cronic v. United States, supra [1984] 466 U.S. 684,
655 [L.Ed.2d 657, 104 S.Ct. 2039]).

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VII. REVIEW SHOULD BE GRANTED BECAUSE THE TRIAL COURT
ERRED IN FAILING TO GIVE A LESSOR INCLUDED OFFENSE
INSTRUCTIONS FOR COUNTS THREE AND FOUR/DENIAL OF DUE
PROCESS, EQUAL PROTECTION UNDER THE LAW AND INEF-
FECTIVE ASSISTANCE OF COUNSEL UNDER THE FIFTH, SIXTH
AND FOURTEENTH AMENDMENTS TO THE UNITED STATES
CONSTITUTION

Incorporated by referenced[Petitioner's PETITION FOR REVIEW, ISSUE VII.,
pages 29-33, Exhibit A]. In addition, Petitioner claims denial of jury trial
for the purpose of above, [fact finding of aggravating factors], violative of
the Sixth Amendment to the United States Constitution-as referenced above and
articulated below. The Introduction, Statement of Issues Presented for Review,
Necessity for Review, Statement of the Case, Statement of the Facts, and
Argument, the procedural background assessments are contained
within[Petitioner's PETITION FOR REVIEW, pages 1-8].

Those incorporated arguments are the bases for the Denial of Due
Process, Equal Protection and ineffective Assistance of Counsel. Additionally,
all arguments contained in the above issues and the below issues are the
predicates and reasons for the within constitutional violations proffered
hereby.

Plus, these proffered arguments by incorporation and reference are
compounded by Petitioner's trial counsel refusals/failures to object to, state
appropriate grounds for those objections and to even accomplish the
appropriate pretrial preparation, such as, investigation of material
witnesses, possible needed expert witness testimony and to research the
applicable law in regards to all the Prosecution's Case in Chief. Please see
supra and infra statutes, case cites, ect.; in direct regards to
constitutional violations herein alleged.

It is contended by Petitioner that the jury's decision was close; that

1 on two occasions the jury requested clarification from the court. The first
2 request, a question: "on CT.3-IS THE CHARGE OF CONCEALED WEAPON BY ITSELF? OR
3 IS THE CHARGE CONTINGENT UPON BEING A GANG MEMBER? HENCE, IF NOT A GANG MEMBER
4 THEN SHOULD WE THEN FIND HAVING A CONCEALED WEAPON AS A CRIME?" [CT 226-dated
5 8/14/03.] The second: "WE NEED COPIES OF THE TRANSCRIPTS FOR MARTINEZ &
6 RODRIGUEZ TESTIMONIES." [CT 227-same date.] Neither responses by the court,
7 prosecutor, nor defense counsels were informative to the jury, and not
8 expanded/clarified on really, at all, to the jury's expectations. The very
9 next day[without the last days requested material facts]the jury has reached a
10 verdict[8/15/2003-at 11:02AM]. Accordingly, one could easily presume that the
11 jury found the defendants guilty of all gang-enhancements due to lack of the
12 requested information; that they were in a hurry to go home. How could they
13 possibly find on the lessor included offenses when, as here, no jury
14 instruction for such was given. [This paragraph is repeated in ISSUE
15 XIII.--combination/cumulitive errors.]

16 Of course, this rejection of the lessor included offenses was a
17 viable-second defense: Counsel stated: "It is for all or nothing theory."
18 However, the lessor included offense(s) instruction did not conflict with
19 Petitioner's theory of; he admitted everything already, but the active/promote
20 or assist gang-enhancements. Therefore, the lessor included offenses(s) would
21 have been the very offense(s) he was already taken responsibility for; the car
22 burglary, discharging a firearm during the commissions, the strike prior, ect.
23 Defense counsel by turning down the lessor included instructions forfeited the
24 only reasonable defense that was so obviously the right defense after talking
25 to his client. Let-alone the evidence against the defendants; numerous
26 witnesses, and the victims property within the defendants car. [See record as
27 a hole.]
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VIII. REVIEW SHOULD BE GRANTED BECAUSE THE IMPOSITION OF
CONSECUTIVE SENTENCES BASED ON JUDICIAL FACT FINDING
IS VIOLATIVE OF THE SIXTH AMENDMENT

Incorporated by referenced [Petitioner's PETITION FOR REVIEW, ISSUE VIII., pages 33-38, Exhibit A]. In addition, Petitioner claims denial of jury trial for the purpose of above, [fact finding of aggravating factors], violative of the Sixth Amendment to the United States Constitution-as referenced above and articulated below. The Introduction, Statement of Issues Presented for Review, Necessity for Review, Statement of the Case, Statement of the Facts, and Argument, the procedural background assessments are contained within [Petitioner's PETITION FOR REVIEW, pages 1-8].

Those incorporated arguments are the bases for the Denial of Due Process, Equal Protection and ineffective Assistance of Counsel. Additionally, all arguments contained in the above issues and the below issues are the predicates and reasons for the within constitutional violations proffered hereby.

Plus, these proffered arguments by incorporation and reference are compounded by Petitioner's trial counsel refusals/failures to object to, state appropriate grounds for those objections and to even accomplish the appropriate pretrial preparation, such as, investigation of material witnesses, possible needed expert witness testimony and to research the applicable law in regards to all the Prosecution's Case in Chief. Please see supra and infra statutes, case cites, ect.; in direct regards to constitutional violations herein alleged.

IX. REVIEW SHOULD BE GRANTED BECAUSE THE COURT ABUSED
ITS DISCRETION IN FAILING TO DISMISS THE STRIKE
PRIOR/DENIAL OF DUE PROCESS, EQUAL PROTECTION OF
THE LAW AND INEFFECTIVE ASSISTANCE OF COUNSEL UNDER
THE FIFTH, SIXTH AMENDMENTS
OF THE UNITED STATES CONSTITUTION

Incorporated by reference [Petitioner's PETITION FOR REVIEW, ISSUE VII., pages 29-33, Exhibit A]. In addition, Petitioner claims denial of Due Process, Equal Protection under the law and ineffective Assistance of Counsel. Under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, respectively-as referenced above and articulated below. The Introduction, Statement of Issues

Presented for Review, Necessity for Review, Statement of the Case, Statement of the Facts, and Argument, the procedural background assessments are contained within [Petitioner's PETITION FOR REVIEW, pages 1-8].

Those incorporated arguments are the bases for the Denial of Due Process, Equal Protection and ineffective Assistance of Counsel. Additionally, all arguments contained in the above issues and the below issues are the predicates and reasons for the within constitutional violations proffered hereby.

Plus, these proffered arguments by incorporation and reference are compounded by Petitioner's trial counsel refusals/failures to object to, state appropriate grounds for those objections and to even accomplish the appropriate pretrial preparation, such as, investigation of material witnesses, possible needed expert witness testimony and to research the applicable law in regards to all the Prosecution's Case in Chief. Please see supra and infra statutes, case cites, ect.; in direct regards to constitutional violations herein alleged.

X. REVIEW SHOULD BE GRANTED BECAUSE THE ERRONEOUS JURY INSTRUCTION ON THE GANG ENHANCEMENT MANDATES REVERSAL BECAUSE IT MISLED THE JURY AS TO THE BURDEN OF PROOF AND THE ELEMENTS OF THE ENHANCE-MENT/DENIAL OF DUE PROCESS, EQUAL PROTECTION AND INEFFECTIVE ASSISTANCE OF COUNSEL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Incorporated by reference [Petitioner's PETITION FOR REVIEW, ISSUE X., pages 42-46, Exhibit A]. In addition, Petitioner claims denial of Due Process, Equal Protection under the law and ineffective Assistance of Counsel. Under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, respectively-as referenced above and articulated below. The Introduction, Statement of Issues Presented for Review, Necessity for Review, Statement of the Case, Statement of the Facts, and Argument, the procedural background assessments are contained within [Petitioner's PETITION FOR REVIEW, pages 1-8].

Those incorporated arguments are the bases for the Denial of Due Process, Equal Protection and ineffective Assistance of Counsel. Additionally, all arguments contained in the above issues and the below issues are the predicates and reasons

1 for the within constitutional violations proffered hereby.

2 Plus, these proffered arguments by incorporation and reference are
3 compounded by Petitioner's trial counsel refusals/failures to object to, state
4 appropriate grounds for those objections and to even accomplish the
5 appropriate pretrial preparation, such as, investigation of material
6 witnesses, possible needed expert witness testimony and to research the
7 applicable law in regards to all the Prosecution's Case in Chief. Please see
8 supra and infra statutes, case cites, ect.; in direct regards to
9 constitutional violations herein alleged.

10 ADDENDUM OF NEW ISSUES
11 AND CLAIMS

12 XI. EXCESSIVE FINES/RESTITUTION ORDERS BY THE TRIAL COURT
13 ASSESSED AGAINST PETITIONER IN EXCESS OF THE COURT'S
14 JURISDICTION AND LIKENING THE ORDER TO AN UNAUTHORIZED
15 SENTENCE

16 Incorporated by reference[Petitioner's PETITION FOR REVIEW, ISSUES I-X.,
17 pages 8-46, Exhibit A]. In addition, Petitioner claims denial of Due Process,
18 Equal Protection under the law and ineffective Assistance of Counsel. Under
19 the Fifth, Sixth and Fourteenth Amendments to the United States Constitution,
20 respectively-as referenced above and articulated below. The Introduction,
21 Statement of Issues Presented for Review, Necessity for Review, Statement of
22 the Case, Statement of the Facts, and Argument, the procedural background
23 assessments are contained within[Petitioner's PETITION FOR REVIEW, pages 1-8].

24 Those incorporated arguments are the bases for the Denial of Due
25 Process, Equal Protection and ineffective Assistance of Counsel. Additionally,
26 all arguments contained in the above issues and the below issues are the
27 predicates and reasons for the within constitutional violations proffered
28 hereby.

Plus, these proffered arguments by incorporation and reference are

compounded by Petitioner's trial counsel refusals/failures to object to appropriate grounds for those objections and to even accomplish the appropriate pretrial preparation, such as, investigation of material witnesses, possible needed expert witness testimony and to research the applicable law in regards to all the Prosecution's Case in Chief. Please see supra and infra statutes, case cites, ect.; in direct regards to constitutional violations herein alleged.

At sentencing, the court "ordered[Petitioner]to pay ten thousand dollars restitution fine, a parole revocation fine," plus restitution to the Victim[Donna Tucker] of \$250.00. [RT 1112-1114.] The Order for Restitution and Abstract of Judgment reflected only the restitution fine of \$250.00 to the Victim[Donna Tucker]. [CT 202-203-Abstract of Judgment.] The Minute Order[CT 235]reflected the following:

The Defendant is to pay a restitution fine pursuant to section 1202.4(b) Penal Code in the amount of \$10,000.00.

Defendant is to pay parole restitution fine pursuant to Penal Code section 1202.45, in the amount of \$10,000.00 said fine is stayed and the stay is to become permanent upon successful completion of parole.

Defendant to pay restitution to Victim[Donna Tucker]pursuant to Penal Code section 1202.4(f) in the amount of \$250.00. [CT 235.]

First, a discrepancy between the judgment as orally pronounced and entered in the minutes or in the abstract of judgment is presumably the result of clerical error and must be resolved in favor of the oral pronouncement. (People v. Mesa[1975] 14 Cal.3d 466, 471; People v. Caudillo[1980] 101 Cal.App.3d 122, 126-127.) Here, since the oral pronouncement did impose penalty assessments[RT 1112-1114], and the Court's Minute Order[CT 235]also reflected the same assessments; but the Order for Restitution and Abstract of Judgment[CT 202-204]failed to reflect the same, that has to be clerical error.

Thus, Petitioner hereby, challenges the assessed restitution fines under[P.C., §§ 1202.4(b) & 1202.45]as excessive and in excess of the Trial

cases were granted review by the California Supreme Court regarding the "ability to pay" provision, notwithstanding the statute, fined under. All these courts found that it was excess of the trial court's jurisdiction to asses fines so high compared to the defendant's ability to pay: Based on the following criterion: Factors such as the defendant's age, physical and mental condition, length of prison sentence, education, work history, family support liabilities and accumulated assets are all relevant to the defendant's ability to pay a restitution fine.

Ideally, the probation report should provide a short analysis of these factors when making a recommendation to the court on the amount of restitution fine to be imposed. (Citing Castro, supra.)

Therefore, when you compare the Petitioner's Probation Report & Supplemental Probation Report [CT 170-183; & CT 184-201-respectively], to that of his ability to pay, it is clear that here also, the trial court acted in excess of it's jurisdiction in assessing two \$10,000.00 fines.

The Petitioner has a family with two young children [family support liabilities]; his prison wage doesn't amount to a sufficient yearly amount [see Exhibit E]; he has no accumulated assets; he approximately is doing 85% of fourteen-(14)-years and four-(4)-months, of which, equals: twelve-(12)-years-point-one-(1): 12.1-years. That's how long he has to pay the first \$10,000.00 fine at his rate of pay. The rest of the factors are contained in both the probation reports, but are not major factors against or for the Petitioner. Therefore, as stated in [Castro] and its prodigy, the Petitioner's fines of both \$10,000.00, and his ability to pay that amount, is not supported by the record and should be reduced accordingly to this Honorable Court's ruling. [CT 170-201 & RT 1101-1114+all other factors in the record as a whole.]

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1 XII. REVERSAL SHOULD BE GRANTED BECAUSE PETITIONER'S
2 CONVICTION UNDER PENAL CODE, SECTION 186.22 ET. SEQ.
3 [CALIFORNIA'S GANG ENHANCEMENT LAWS] ARE UNCONSTITUTIONAL
4 AND IN EXCESS OF THE COURT'S JURISDICTION, OF WHICH,
5 PROVIDED A DENIAL OF DUE PROCESS AND EQUAL PROTECTION
6 UNDER THE LAW, ALL UNDER THE FIFTH, SIXTH AND FOURTEENTH
7 AMENDMENTS TO THE UNITED STATES CONSTITUTION

8 Incorporated by reference [Petitioner's PETITION FOR REVIEW, ISSUES I-X.,
9 pages 8-46, Exhibit A]. In addition, Petitioner claims denial of Due Process,
10 Equal Protection under the law and ineffective Assistance of Counsel. Under the
11 Fifth, Sixth and Fourteenth Amendments to the United States Constitution,
12 respectively-as referenced above and articulated below. The Introduction,
13 Statement of Issues Presented for Review, Necessity for Review, Statement of
14 the Case, Statement of the Facts, and Argument, the procedural background
15 assessments are contained within [Petitioner's PETITION FOR REVIEW, pages 1-8].

16 Those incorporated arguments are the bases for the Denial of Due Process,
17 Equal Protection and ineffective Assistance of Counsel. Additionally, all
18 arguments contained in the above issues and the below issues are the predicates
19 and reasons for the within constitutional violations proffered hereby.

20 Plus, these proffered arguments by incorporation and reference are
21 compounded by Petitioner's trial counsel refusals/failures to object to, state
22 appropriate grounds for those objections and to even accomplish the appropriate
23 pretrial preparation, such as, investigation of material witnesses, possible
24 needed expert witness testimony and to research the applicable law in regards
25 to all the Prosecution's Case in Chief. Please see supra and infra statutes,
26 case cites, ect.; in direct regards to constitutional violations herein
27 alleged.

28 Due to the above and the below, Petitioner hereby, contends that the
California's [STEP-ACT] is unconstitutional on its face. By allowing expert

1 testimony on the proffered hearsay evidence, of which, used against the
2 defendant's and the Petitioner herein, as material facts that, he said, she
3 said, proves the elements within this act deprives the defendants and the
4 Petitioner herein, of a fair trial, for this allows the jury to find them
5 guilty of less than, beyond a reasonable doubt.

6 Additionally, as applied to the Petitioner, this statute is
7 unconstitutional. In People v. Zermeno, 21 Cal.4th 927, 89 Cal.Rptr.2d 863; 986
8 P.2d 196[Nov. 1999]: In Zermeno the California Supreme Court reversed his case
9 because of the aiding & abetting offense-to prove one of the predicate
10 offenses-was a single offense, not two(2)-offenses, of which, was used to
11 establish the "gang Activity," element within the[STEP-ACT].

12 In Petitioner's case the same use occurred: The Prosecutor stated:
13 "Correct, because we will be pursuing an aiding and abetting theory on Mr.
14 Rodriguez on Count 1, Just not by virtue of natural and probable consequences."
15 [RT 506:9-15; & 507:6-8.] His contention is easily discerned; due to the use of
16 the theory of aiding and abetting, even on just Count 1, the jury was easily
17 mislead on finding Petitioner guilty on all counts. Even with the correct
18 instructions to the jury-as was not the case here-the jury would transfer the
19 elements therein, to all counts. Then with all reasonable inferences drawn, a
20 reasonable trier of fact could not possibly find the Petitioner guilty beyond a
21 reasonable doubt. For the Trial Court to allow such a error to take place, the
22 Prosecutor for misleading, and for Petitioner's Counsel for not objecting is
23 understandable, for the complexity of the issues, the statutes, and case-law
24 involved, anyone would be baffled. [See Prosecutor's Trial Memorandum-CT 16.]
25 [See also, Witkin & Epstein California Criminal Law 2d ed. 1988 § 1251B.]
26

27 Those violations being under the Fifth, Sixth and Fourteenth Amendments
28 to the United States Constitution. (Garcia v. Carey, supra[Jan. 21st, 2005] 395

1 F.3d 1099; citing Jackson v. Virginia, supra, 443 U.S. 307, 324 [1979].)

2 XIII. REVERSAL SHOULD BE GRANTED BECAUSE THE COMBINATION
3 OF NUMEROUS EVIDENTIARY ERRORS CAUSED THE TOTALITY
4 OF CIRCUMSTANCES, OF WHICH, CONSTITUTED A DEPRIVATION
5 OF SUBSTANTIVE DUE PROCESS DURING THE TRIAL COURT
6 PROCEEDINGS

7 Incorporated by reference[Petitioner's PETITION FOR REVIEW, ISSUES I-X.,
8 pages 8-46, Exhibit A]. In addition, Petitioner claims denial of Due Process,
9 Equal Protection under the law and ineffective Assistance of Counsel. Under the
10 Fifth, Sixth and Fourteenth Amendments to the United States Constitution,
11 respectively-as referenced above and articulated below. The Introduction,
12 Statement of Issues Presented for Review, Necessity for Review, Statement of
13 the Case, Statement of the Facts, and Argument, the procedural background
14 assessments are contained within[Petitioner's PETITION FOR REVIEW, pages 1-8].

15 Those incorporated arguments are the bases for the Denial of Due Process,
16 Equal Protection and ineffective Assistance of Counsel. Additionally, all
17 arguments contained in the above issues and the below issues are the predicates
18 and reasons for the within constitutional violations proffered hereby.

19 Plus, these proffered arguments by incorporation and reference are
20 compounded by Petitioner's trial counsel refusals/failures to object to, state
21 appropriate grounds for those objections and to even accomplish the appropriate
22 pretrial preparation, such as, investigation of material witnesses, possible
23 needed expert witness testimony and to research the applicable law in regards
24 to all the Prosecution's Case in Chief. Please see supra and infra statutes,
25 case cites, ect.; in direct regards to constitutional violations herein
26 alleged.

27 Additionally, in regards to Petitioner's trial counsel's performance
28 during the whole trial proceedings, all the issues above and below, have shown
a clear pattern of incompetency. The combination or cumulative acts and

omissions show an unequivocal lack of preparation and investigation into the facts of the Petitioner's defense. Mr. Sanchez was very sick physically[taking numerous mind altering medications; i.v. in his arm during the court proceedings, and nodding-off during important times of same]; was having legal problems himself, civil action against himself; and thus, under enormous mental and physical stress during the trial court proceedings; and not even present during other important parts of the pretrial and court trial. [RT 101; 101-102; and 2-respectively.] (In Re Rocha, DAR, [Dec. 30, 2005], at page 14919[Case#B180415-Cal.2d]; deficient performance of trial counsel rendered in conducting his pretrial investigation necessarily was prejudicial to defendant and thus requires a new trial.)

However, here in Petitioner's case his trial counsel was also deficient in challenging the Prosecution's Case in Chief. As within the meaning of-(Cronic v. United States[1984] 466 U.S. 684, 655[L.Ed.2d 657, 104 S.Ct. 2039]). He failed in all areas, areas he could have put on a defense for his client; instead of assuming the facts of the Prosecution's Case were true, and just accepting the Prosecutor's file, full of the right facts. The record as a whole shows clearly that he failed/refused to object to very incriminating evidence, that was dubious as to its admissibility. Prejudicial out-weighing the probative value. He failed/refused to conduct invaluable research into the charged offenses or case-law that's very important court interpretation of those charged offense. Directly in regards to the[STEP-ACT]he did not even attempt to conduct minimal applicable research before showing up in court. When you consider the importance of the sentencing enhancements attached to Petitioner's Case[STEP-ACT]; this was the greater part of his sentence, plus, of course, the doubling effect of his prior serious felony, alleged against him. During the sentencing phase, Petitioner's Trial Counsel was very concerned about his client being found guilty for all those gang-enhancements. [RT

1 1101-1103.] If he was so troubled about the gang applicability, why did he not
2 do his homework...Petitioner was not an active gang member during his offenses.
3 He testified to that fact. [RT 1104-1105; and Probation Report 195-196.] As an
4 example of challenges to the[STEP-ACT]enhancements-see-(Garcia v. Carey[2005]
5 395 F.3d. 1099; considering the date of this Case-cite[2005]it was not
6 opinioned until subsequently to, Petitioner's conviction; however, the
7 cases-cited within was used to affirm the granting of relief, and were already
8 published during Petitioner's trial). Therefore, Petitioner's Counsel should of
9 found them with minimal effort. Plus, most were in the Prosecutor's Trial
10 Memorandum[Exhibit D, pages 1-27]or could be discovered with minimal research
11 techniques. His counsel could have proffered objections to or an answer to that
12 memorandum; could have filed motions in limine, a motion to demurr, or/and a
13 motion to strike in regards to the[STEP-ACT].

14 The other combination or cumulative error[s]are stated above and below;
15 however, it should also be considered under this heading also.

16 The following is a combined argument based on a mixture of issues already
17 considered above and below. For, the cumulative effect of the dual-use of
18 elements is overwhelming when attempting to conceive: Due to the use of
19 elements[considered facts]over and over again, it would be reasonable to
20 conclude that, it is, un-constitutional on its face, that statute, that caused
21 such an effect-an increased prison sentence. The Statute in question here
22 is[the STEP-ACT: P.C., § 186.22 et. seq.], of which, is open to challenges to
23 it's face. Especially, looking at Petitioner's Case, his prior offense[P.C., §
24 459]was used to impeach him; it was used as a predicate offense in[STEP-ACT],
25 as a prior within the meaning of[P.C., § 667(a)-five year enhancement]and again
26 under[California's Three-Strike Law, P.C., §§ 667(b)-(i) & 1170.12][prior at CT
27 7: Amended Complaint; RT 4; 5-7; 8:1-6; 8-10; 11-17; & allowed in by the
28 court-22:11-25; 1004:1-5]. Once convicted of all counts and gang/gun

1 enhancements the court during sentencing used the prior strike allegation to
2 double most of Petitioner's Sentence and to limit his credit earning ability to
3 (the court stated: "credit under[P.C., § 2933.1+85%[Vol.#8-RT 1112:17];
4 however, this is in direct conflict with doubling his sentence; due to, The
5 Strike Law incorporates 80%, once the sentence is doubled-that's hand-in glove;
6 you can't have one without the other. [See P.C., § 667(e)(1).]

7 To re-cap the duel-use above, now Petitioner's prior conviction was used,
8 not twice-as priors are used-but four times, plus, doubling/credit earning
9 reduction.

10 Gloria A. Vazquez[Petitioner's girl friend-now his wife]also testifies to
11 the fact that, he has not been an active gang member for along time; instead he
12 has been going to work everyday and providing for his family. [RT 416-428.] And
13 again Petitioner testifies to that fact. [RT 428-433.]

14 Counsel totally failed when it came to affirmative defenses that should
15 have been used to negate the elements involved. Intoxication during the crime.
16 [RT 434.] Jury Instruction on Intoxication was requested by Petitioner's
17 Co-defendant's Trial Counsel[Mr. Leahy][RT 440:4-8]. Although, limited
18 instruction were given, Petitioner's Counsel should have backed-up those given
19 instructions with defense expert testimony of the true effects of Roches[known
20 as the rape-drug-Rohypnol-a sedative-hypnotic drug][Probation Report-CT
21 179-17-near bottom]. Petitioner testified to the fact that he was intoxicated
22 that night. [RT 433:24-28; 434:1-27; & 532:26-28.] And no expert testimony
23 offered by Petitioner's Counsel, no foundation of authenticity regarding the
24 fact of that specific drug was used. Counsel failed/refused to even argue the
25 facts testified to, by his own client. [RT 549:22-28; 550:1-28.] However, as
26 stated already, Petitioner's Co-defendant's Counsel[MR. Leahy]requested the
27 instruction for intoxication. [RT 440:4-8.]
28

1 Thus, other corroborating witnesses along with the two mentioned, would
2 have had a different light shined upon the jury's face; of which, would have
3 changed the outcome of the jury's decision to convict on the presently active
4 gang member enhancements. This would reduce the Petitioner's overall sentence
5 immensely. It is clear from the record that Petitioner was not a active member
6 or even promoting/assisting any gang crimes. The record shows the opposite;
7 that he had distance himself from the grips of the street gang he was a member
8 before. That he had started a family and moved away from that gang's territory.
9 He was a good provider for his family. He made the mistake of going to party
10 with an old friend, using drugs and alcohol to the point of inhibition. He was
11 showing off with a dangerous weapon, he never attempted to persuade anyone to
12 do anything; he was totally intoxicated and made very bad mistakes and bad
13 errors of judgment, of which, he knows he has to pay for. However, the sentence
14 he received is enhanced badly also.

15 Petitioner's counsel failed/refused to gain the plea-bargain he said he
16 would, early in the pretrial proceedings: seven[7]-years or no more than
17 ten[10]-years.

18 Counsel failed/refused advise Petitioner correctly on testifying in his
19 own behalf: but, advised him strongly to testify: did not inform Petitioner of
20 possible consequences (i.e., what it would mean to be impeached by his prior
21 serious felony conviction: of having to admit that prior; that it would be
22 detrimental in regards to the gang-enhancements alleged against him; that it
23 would qualify as a strike under the strike-law, that it could be used to double
24 his sentences; be enhanced under an additional five[5]-years to any new serious
25 felony conviction); and that, exposure of such, would cause the jury to find
26 him guilty based on that, prejudicial admission. Additionally, considering
27 Petitioner's prior gang-involvement, his impeachment in this area, had the most
28

1 detrimental effect-overall, the significant increased sentence based upon same.

2 (Cronic, supra.)

3 It is contended by Petitioner that the jury's decision was close; that on
4 two occasions the jury requested clarification from the court. The first
5 request, a question: "on CT.3-IS THE CHARGE OF CONCEALED WEAPON BY ITSELF? OR
6 IS THE CHARGE CONTINGENT UPON BEING A GANG MEMBER? HENCE, IF NOT A GANG MEMBER
7 THEN SHOULD WE THEN FIND HAVING A CONCEALED WEAPON AS A CRIME?" [CT 226-dated
8 8/14/03.] The second: "WE NEED COPIES OF THE TRANSCRIPTS FOR MARTINEZ &
9 RODRIGUEZ TESTIMONIES." [CT 227-same date.] Neither responses by the court,
10 prosecutor, nor defense counsels were informative to the jury, and not
11 expanded/clarified on really, at all, to the jury's expectations. The very next
12 day[without the last days requested material facts]the jury has reached a
13 verdict[8/15/2003-at 11:02AM]. Accordingly, one could easily presume that the
14 jury found the defendants guilty of all gang-enhancements due to lack of the
15 requested information; that they were in a hurry to go home. How could they
16 possibly find on the lessor included offenses when, as here, no jury
17 instruction for such was given. It can also be presumed that, the jury found
18 true on the gang-enhancements due to the Prosecution's Star-Expert Witness[Mr.
19 Martinez]; for without any defense expert testimony to the contrary or really
20 any evidence proffered by the defense, the jury had nothing to work-on, but the
21 Prosecution's Case in Chief. (Cronic, supra.)

22 Therefore, the cumulative effect of the errors were very prejudicial and
23 requires reversal.

24 The premise behind the cumulative error doctrine is that while a number
25 of errors may be harmless taken individually, their cumulative effect requires
26 reversal. (People v. Bunyard[1988] 45 Cal.3d 1189, 1236.)

27 When errors of federal magnitude combine with non-constitutional errors,
28

1 all errors should be reviewed under Chapman standard. In People v. Williams
2 (1971) 22 Cal.App.3d 34, 58-59, the court summarized the multiple committed
3 trial level and concluded: "Some of the errors reviewed are of constitutional
4 dimension. Although they are not the type calling for automatic reversal, we
5 are not satisfied beyond a reasonable doubt that the totality of error we have
6 analyzed did not contribute to the guilty verdict, was not harmless error.
7 [Citations.] (Chapman v. California, 386 U.S. 18 [1967].)
8

9
10 CONCLUSION

11
12 Due to the singular errors expressed within, reversal can be provided on
13 each and everyone. However, if this Honorable Court decides differently,
14 Petitioner request the Court to find the cumulative effect violated his rights
15 as stated above.

16 The Petitioner hereby, request from this Honorable Court to consider the
17 very long increased sentence, of which, he has been exposed to, and the long
18 term-effect upon his family[notwithstanding his admitted to, responsibility
19 early in the Trial Court Proceedings]. He admits that he was very foolish and
20 caused immeasurable damage to others and has remorse for all.
21

22 PRAYER FOR RELIEF

23
24 Petitioner therefore, request that this Honorable Court:

25 1. Take judicial notice of all records relevant to Petitioner's Cases[RT
26 & CT's, ect.]entitled People v. Javier Rodriguez (May 14th, 2003) Superior
27 Court Case#SCS176087; Court of Appeal, Fourth Appellate District Case# DO43198;
28 and the California Supreme Court Case# S133875;


2. Declare the rights of the parties;

3. Issue an Order to Show Cause, returnable before this Honorable Court,
as to why Petitioner's Conviction and Sentence should not be set aside or the
gang-enhancements should not be stricken;

4. Upon final review, order that Petitioner's Conviction and Sentence be
set aside, order a new trial to be granted; and provide any and all other
relief as may be deemed appropriate in the interest of justice.

Dated: 7-11-06.

Respectfully submitted,


Javier Espinoza Rodriguez
Petitioner, in pro per

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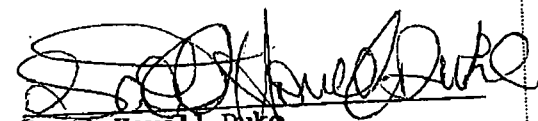
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Dated: 7-11-06.


Scott Howell Duke
Researched, composed and typed
by

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1 A.

2 THE APPLICABILITIES OF NUMEROUS STANDARDS OF REVIEWS,

3 AND REGARDLESS OF WHICH STANDARD APPLIES,

4 PETITIONER HAS ESTABLISHED HE IS WORTHY OF RELIEF

5
6 In general, the petitioner has established he is worthy of relief-on each
7 and all claims/issues-regardless of which, standard of review applies to which
8 claim(s)/issue(s). In the alternative, his cumulative arguments have great
9 merit, and he has obviously established that, many of his constitutional rights
10 were violated during his trial. That his right to a fair trial was invaded in
11 numerous areas as stated above and below; that his right to effective
12 assistance of counsel was-stomped upon-in more than numerous areas as
13 established above and below, that all his calims/issues have been boot-strapped
14 to his claims/issues contended under the ineffective assistance of counsel
15 standard of review. [Strickland, or/and Cronic standard.]

16 Therefore, considering the generalities of this part within, please
17 consider these general arguments of which, standard of review might apply,
18 consider all Petitioner's Claims/Issues, and arguments to be applicable
19 thereon, even if not mention specifically-as of yet.

20
21 Whether the standard of review that is applicable is contained within the
22 cited authorities, the clearly established federal law [meaning U.S. Supreme
23 Court Opinions]; or the applicability of Antiterrorism and Effective Death
24 Penalty Act of 1996 ["AEDPA"], adds a second level of deference to this
25 standard, so that a federal habeas petitioner may obtain relief only by
26 demonstrating that, the state court's adjudication on the merits of the claim
27 involved an unreasonable application of [U.S. Sup. Ct. Cites] or contrary to
28 standard applies. That would fall upon this Honorable Court's opinion and

1 discretions.

2 Either or both, it is Petitioner's Contention that he has established that
3 relief should be granted under either or both standard(s). He would hope that
4 this Honorable Court agrees, and therefore, grants the requested relief.

5
6 B.

7 STANDARD OF REVIEW

8
9 The Antiterrorism and effective Death penalty Act of 1996 [hereinafter
10 "AEDPA"] became effective on April 24, 1996. When a state court adjudicates a
11 claim on the merits, the AEDPA bars federal habeas corpus relief on the claim
12 unless the state-court adjudication was either (1) "contrary to, or involved an
13 unreasonable application of, clearly establish federal law, as determined by
14 the Supreme Court of the United States," or "based on an unreasonable
15 determination of the facts in light of the evidence presented in the State
16 Court proceeding." 28 U.S.C. § 2254(d); Price v Vincent [2003] 538 U.S. 634,
17 638-39, 123 S.Ct. 1848, 155 L. Ed. 2d 877. This is a "'highly deferential
18 standard for evaluating state-court rulings' which demands that state-court
19 decisions be given the benefit of the doubt." Woodford v Visciotti [2002] [per
20 curiam] [quoting Lindh v Murphy [1997] 521 U.S. 320, 333 n.7, 117 S.Ct. 2059,
21 138 L. Ed. 2d 481.

22 A state court decision is "contrary to" federal law if it either "applies
23 a rule that contradicts the governing law" as set forth in Supreme Court
24 opinions, or reaches a different decision from a Supreme court opinion when
25 confronted with materially indistinguishable facts. Williams v Taylor [200] 529
26 U.S. 362, 405-06, 120 S.Ct. 1495, 146 L. Ed. 2d 389; accord Bell v Cone [2002]
27 535 U.S. 685, 694, 122 S.Ct. 1843, 152 L. Ed. 2d 914 [Bell I]; Clark v Murphy
28

1 [9th Cir. 2003] 331 F.3d 1062, 1067. A state court makes an "unreasonable
2 application" of federal law if the state court identifies the correct governing
3 legal principle from the Supreme Court's decisions but unreasonably applies
4 that principle to the facts of the petitioner's case. Williams v Taylor, supra,
5 529 U.S. at 413; Bell I, 535 U.S. at 694; accord Lockyer v Andrade [2003] 538
6 U.S. 63, 71, 123 S.Ct. 1166, 155 L. Ed. 2d 144. ["AEDPA does not require a
7 federal habeas court to adopt any one methodology in deciding the only question
8 that matters under § 2254(d)(1)--whether a state court decision is contrary to,
9 or involved an unreasonable application of, clearly established federal law".]

10 A state court's failure to cite any federal law in its opinion does not
11 run afoul of the AEDPA. In fact, "so long as neither the reasoning nor the
12 result of the state-court decisions contradicts them." Early v Packer, supra,
13 537 U.S. at 8; Bell v Cone [2005] 543 U.S. 447, 455, 125 S.Ct. 847, 160 L. Ed.
14 2d 881 [per curiam] [Bell II] [federal courts are not free to presume that a
15 state court did not comply with constitutional dictates on the bases of nothing
16 more than a lack of citation; federal courts must presume that the state court
17 applied the same constitutionally sufficient review it used in earlier cases
18 absent some contrary indication].

19
20 C.

21 THE GANG ENHANCEMENT(S)/CONVICTION(S) USED AGAINST PETITIONER,
22 AND THE GRANTING OF RELIEF BASED UPON ANY SAID STANDARD OF REVIEW
23

24 In Petitioner's Case, Grounds I-XIII were rejected on the merits by the
25 California Supreme Court on habeas corpus, as that Court's Denial of relief
26 without comment [A.K.A.--Post-Card Denial] or citation of authority constituted
27 a denial on the merits. See Hunter v Aispuro [9th Cir. 1992] 982 F.2d 344,
28

1 347-48. Federal habeas review of these claims is not de novo despite the fact
2 that the California Supreme Court denied the claims without comment, and
3 instead the record must be independently reviewed in order to determine whether
4 the denial was objectively unreasonable. See Himes v Thompson [9th Cir. 2003]
5 336 F.3d 848, 852-53. It appears that all Grounds I-XIII were rejected in an
6 unreasonable opinion on appeal by the California Court of Appeal.

7 As shown above, and below, the AEDPA, and even its "highly deferential
8 standard of review," provides relief in this case.

9 Additionally, attached to, all of the Petitioner's Grounds, is his
10 claims/issues of Ineffective Assistance of Counsel, [ditto-for those
11 claims/issues regarding appellate counsel], of which have been boot-strapped to
12 his claims/issues. [Please see pp. 1-3, of the attached pleadings, of his
13 petition.] [See Part D-below for further expansion of [IAC].]

14 Petitioner's Claim(s)/Issue(s) regarding Gang Enhancement(s)/Conviction(s)
15 are contained within [CLAIMS AND ISSUES, ISSUES II, III [PARTS A, B], IV, V,
16 XII, & XIII] of his Petition.

18 1.

19 SPECIFIC INTENT ELEMENT

20
21 As Garcia v Carey [9th Cir. 2005] 395 F.3d 1099 has established, under
22 either standard of review, the petitioner herein, meets either
23 standard-separately or taken together. Especially since, the record shows that,
24 the petitioner was no longer an active gang-member, and had no specific intent
25 on aiding & abetting an inactive or active gang-member, period. The record
26 establishes just the reverse-that he was no-longer an active gang-member, had
27 moved out of the gang-land territory, had been working to take care of his
28

1 [then] girlfriend, [now] his wife, and his children. He and his girlfriend
2 testified to those facts. [RT 416-428; RT 428-433-respectively: Corresponding
3 to Petitioner's Petition at the attached page 29.] [Also Probation Report at CT
4 173: ¶3-5.]

5 Unlike Garcia, petitioner was not an active gang-member or aiding &
6 abetting any other gang-members-no "specific intent," element intended.

7 Under Garcia..."[T]he district court determined that habeas relief was
8 proper because 'the prosecution failed to present any direct or circumstantial
9 evidence that [Garcia] robbed Bojorquez with the specific intent to promote,
10 further, or assist in other criminal conduct by the [E.M.F.] street gang.'
11 [Ibid., at p. 1101.]

12 As established by testimony from both the petitioner and his girlfriend he
13 no-longer was an active gang-member, nor did he possess the specific intent to
14 promote, further, or assist in other criminal conduct by any said or un-said
15 gangs. The only so-called circumstantial evidence that he was still active came
16 from the Prosecution's Expert Witness [MR. Martinez], a person of whom, did not
17 know the defendant/petitioner personally, who could not-even, if allowed
18 to-testify to that, non-fact, there was never any specific intent to promote,
19 further, or assist in any or other conduct for any or other gang or member. [RT
20 341-370.] The witness used field-notes to establish petitioner as a active
21 gang-member or knew he was assisting an active gang-member; these field-notes
22 are not "certified" in any way or matter, they are not considered "testimony"
23 or "verified substantial material facts," of which, can establish or prove
24 beyond a reasonable doubt the elements of the alleged charges. Field-notes can
25 not be cross-examined, they do not show or establish material facts, such as
26 the specific intent prong within the [S.T.E.P. Act]. [RT 341-370.]

27 Thus, as within Garcia: ..." [S]ee Chein v Shumsky [9th Cir. 2004] [en
28

1 banc]. Like our en banc court in *Chein*, we do not decide the affect of AEDPA on
2 Jackson because we reach the same result whether we review directly under
3 Jackson or whether we review more deferentially the state court's application
4 of jackson under AEDPA's standard...." [Ibid., at p. 1101 [italics omitted].]

5 Therefore, there was no showing of any elements of the necessary "specific
6 intent," that resulted into, a clear violation of Petitioner's fundamental
7 right to a "fair trial."

8 Other California cases also present examples of the kind of evidence
9 permitting inferences of specific intent to further other criminal gang
10 activity. See e.g., People v Augborne [2002] 104 Cal. App.4th 362, 372-73
11 [expert testimony to the belief that crimes were committed for promotion and
12 assistance of criminal conduct by gang members]; In re Ramon [1997] 57 Cal.
13 App.4th 201, 207-08 [finding gang enhancement supported by expert evidence and
14 unequivocal act where the attack against a police officer who had another gang
15 member in custody was committed in order to assist the gang member's escape];
16 California v Ortiz [1997] 57 Cal. App.4th 480, 484-85 [finding sufficient
17 evidence was that a robbery and murder were committed with the specific intent
18 of framing a rival gang for the crimes]. Here, Detective Hernandez testified
19 that Garcia was a member of the E.M.F. gang, that the robbery was committed in
20 gang territory, and that the E.M.F. gang was "turforiented." Detective
21 Hernandez did not offer any testimony, however, on what was meant by being
22 "turforiented," what implications arose from a gang being "turforiented," or
23 how the gang's "turforiented" nature could support the conclusion that this
24 robbery was committed with the specific intent to promote, further, or assist
25 other gang related criminal activity. Without this evidentiary link, it is
26 unreasonable to conclude that a rational jury could find Garcia committed this
27 robbery with the specific intent to facilitate other gang crimes. There was
28

1 simply a total failure of proof of the requisite specific intent. The district
2 court correctly granted habeas relief on the gang enhancement, and on the
3 firearm enhancement that depended on it. [*Ibid.*, at p. 1001-1102 [*italics*
4 omitted].]

5 Like the petitioner herein, he did not possess the requisite "specific
6 intent," to promote, further, or assist other gang related criminal activity.

7 Since the inception of Garcia, and the effect upon Augborne, In re Ramon,
8 & Ortiz, the California Courts of Appeal have had published their new opinions,
9 of which have their interpretation of Garcia, and their reasons,
10 failures/refusals to follow the 9th Circuit Court's ruling thereon, that was
11 based on Jackson U.S. Supreme Court firmly established federal law. These cases
12 are People v Romero [2006] 43 Cal.Rptr.3d 862, 140 Cal. App.4th 15; & People v
13 Hill [2006] 47 Cal.Rptr. 3d 875, 142 Cal. App.4th 770: of which, they attempt
14 to find fault within the wording of the (9th Circuit Court of Appeals by using:
15 "Garcia, however, misinterprets California law. 'In (*italics-Garcia*), the Ninth
16 Circuit found insufficient evidence of specific intent to promote, further, or
17 assist in (*italics-other*) criminal conduct by the defendant's gang. We disagree
18 with (*italics-Garcia's*) interpretation of the California statute, and decline
19 to follow it. (See *People v. Burnett* (2003) 110 Cal.App.4th 868, 882, [2
20 Cal.Rptr.3d 120][] [federal authority is not binding in matters involving state
21 law]; see also *Oxborrow v. Eikenberry* (9th Cir. 1989) 877 F.2d 1395, 1399
22 [state court interpretation of state statute binding of federal court unless
23 interpretation is a subterfuge or untenable].) By its plain language, the
24 statute requires a showing of specific intent to promote, further, or assist in
25 'any criminal conduct by gang members,' rather than (*italics-other*) criminal
26 conduct. (§ 186.22 subd. (b)(1), *italics added.*)' (*People v. Romero* (2006) 140
27 Cal.App.4th 15, 19, 43 Cal.Rptr.3d 862, *italics in original.*) We agree with
28

1 Romero." [Quoting People v Hill, supra, [2006] 47 Cal.Rptr.3d 875, 879 at ¶3,
2 142 Cal.App.4th 770, 774 at ¶3. [italics in original as (italics-)].]

3 This word playing by the California Courts of Appeals show that their very
4 opinions, and their standard of reviews are contrary to, and a misapplication
5 of established federal law-in this case Jackson v Virginia, supra, and as
6 applied properly to Garcia, supra.

7 In Garcia: and as within the Petitioner's Case herein, [based upon the
8 same facts-and additionally, since the record proves he was no longer an active
9 gang-member]; of which, applies the right standard of review incased in
10 Jackson, and articulated within Garcia by the 9th Circuit Court of Appeals.
11 Thus, their interpretation doesn't garble the words, and the interpretation
12 thereon, [P.C. § 186.22(B)-S.T.E.P. Act], by attempting to tangle the plain
13 meaning of "to promote , further, or assist in (any-italics) criminal conduct
14 by gang members." [Quoting People v Hill, supra, *ibid.*, at 879 ¶4; & 774
15 ¶4-respectively.] And compared to; Garcia, supra, at p. 1102, fn.5: "It is
16 important to keep these two requirements of the gang enhancement separate. For
17 example, (italics-People v. olguin), 31 Cal. App.4th (1994), cited by the
18 California court of appeal in affirming Garcia's sentence, dealt with a
19 challenge to the sufficiency of the evidence to meet the first
20 requirement--that the crime of conviction be 'for the benefit of, at the
21 direction of, or in association with' a criminal street gang--not the second
22 requirement of specific intent to further other criminal activity of the gang.
23 (Italics-See *id.*) at 1382."

24
25 Ergo, as within Garcia, we are dealing with the first requirement in
26 Petitioner's Case, not the second requirement. Basically, in this case at bar,
27 petitioner is contending that neither requirements apply in his case; neither
28 requirements were really proven during his trial, just the opposite was shown,

1 due to only one so-called expert witness testified that within his field-notes
2 the petitioner was still an active gang-member, however, not only did petitioner
3 testify that he was no longer an active gang-member, but his girlfriend-of whom
4 corroborated his testimony, was totally credible in court-there was additional
5 evidence corroborating this fact, the Probation Report. [Exhibit G, at CT 190
6 ¶3, 194-196 ¶1 & ¶s7-9.] Although, the CAL/GANGS Information Center considered
7 him still active, there was more evidence to the opposite according to the
8 record during and attendant upon it.

9 Accordingly, to the "specific intent" requirement(s), there was
10 insufficient evidence [proof offered] to establish or support any of the
11 elements, and meet either requirements of the [S.T.E.P. Act], in regards to
12 petitioner.

13
14 D.

15 THE CALIFORNIA SUPREME COURT'S AND THE APPELLATE COURT'S
16 REJECTION OF PETITIONER'S INEFFECTIVE ASSISTANCE OF COUNSEL
17 CLAIM WAS OBJECTIVELY UNREASONABLE
18

19
20 Petitioner's Claims/issues regarding Ineffective Assistance of Counsel are
21 contained within [ALL CLAIMS AND ISSUES, ISSUES I-XIII] of his Petition; for due
22 to the facts that, those claims/issues of [IAC] are bootstrapped to all his
23 claims/issues.

24 ////

25 ////
26
27
28

1.
12
3 APPLICABLE LAW

4 STANDARD OF REVIEW

5 UNDER

6 Strickland

7 In order to prevail on a claim of ineffective assistance of counsel, a
8 defendant must show both that counsel's conduct fell below an objective
9 standard of reasonableness, and that the defendant was prejudiced by
10 counsel's acts or omissions. Strickland v Washington [1984]; accord [Bell I],
11 supra, 535 U.S. at 695; Williams v Taylor, supra, 529 U.S. at 390. Strickland
12 imposes a "highly demanding" standard upon the defendant to prove "gross
13 incompetence." Kimmelman v Morrison [1986] 477, U.S. 365, 382, 106 S.Ct.
14 2574, 91 L. Ed. 2d 305. According to the Supreme Court, judicial review of a
15 Strickland claim is "highly deferential," and "doubly deferential when it is
16 conducted through the lens of federal habeas." Yarborough v Gentry [2003] 540
17 U.S. 1, 5, 124 S. Ct. 1, 157 L. Ed. 2d 1 [per curiam]; see Delgado v Lewis
18 [9th Cir. 2000] 223 F.3d 976, 981 [Strickland standard is "very forgiving"].
19

20
21 2.

22 APPLICABLE LAW

23 STANDARD OF REVIEW

24 UNDER

25 Cronic

26
27 Alike Strickland, supra, Petitioner's Case was lacking due to that
28

1 counsel being physically absent at many times during crucial court
2 proceedings. [See generally, PETITIONER'S PET. at the attached pp. 1-33.] And
3 at those times when he was absent co-counsel hardly offered constitutional
4 effective assistance due to attempting to be attentive to his own client-the
5 co-defendent. Strickland, supra, at 466 U.S. at 692; see U.S. v Taylor,
6 supra, 933 F.2d 307, 311-13 [court's refusal to retract defendant's waiver of
7 right to counsel and to appointed counsel for sentencing denied defendant
8 assistance of counsel when, given key limitation on standby counsel that such
9 counsel not responsible for accused's defense as full-fledged counsel,
10 standby counsel not "counsel" for Six Amendment purposes], cert. denied,
11 (italics omitted), 502 U.S. 883 [1991]]. Similarly, if counsel "entirely
12 fails to subject the prosecution's case to meaningful adversarial testing,"
13 the adversarial process itself becomes presumptively unreliable. Cronic
14 (italics omitted, bold & underlining added).

15 Alike Cronic, supra, Petitioner's Counsel (Mr. Sanchez) failed/refused
16 "entirely fails to subject the prosecution's case to meaningful adversarial
17 testing." [See generally, PETITIONER'S PET. at the attached pp. 1-33.]

18 And the combination and cumulative acts and omissions show an
19 unequivocal lack of preparation and investigation into the facts of the
20 Petitioner's Defense. Mr. Sanchez was very sick physically [taking numerous
21 mind-altering medications; i.v. in his arm during court proceedings, and
22 nodding-off during important times of same]; was having legal problems
23 himself, civil action against himself; and thus, under enormous mental and
24 physical stress during the trial court proceedings; and not even present
25 during other important parts of the pretrial and court trial. [RT 101;
26 101-102; and 2-respectively.] [In re Rocha, DAR [Dec. 30, 2005] at page 14919
27 [Case# B180415-Cal.2d] deficient performance of trial counsel rendered in
28

1 conducting his pretrial investigation necessarily was prejudicial to
2 defendant and thus, requires a new trial.)

3 Additionally, herein Petitioner's Case his trial counsel was also
4 deficient in challenging the Prosecution's Case in Chief. As within, the
5 meaning of Cronic, supra, he failed in all areas he could have put on a
6 defense for his client; instead the of assuming the facts of the
7 Prosecution's Case were true, and just accepting the Prosecution's File, full
8 of the right facts taken as true. The record as a whole clearly shows
9 [demonstrates] that he failed/refused to object to very incriminating
10 evidence, that was dubious as to its admissibility. Prejudiced out-weighting
11 the probative value. He failed/refused to conduct invaluable research into the
12 charged offenses or case-law that's very important court interpretation of
13 the language within those charged offenses. Directly in regards to the
14 [SEPT-ACT] he did not even attempt to conduct minimal applicable research
15 before showing up into court. When you consider the importance of the
16 sentencing enhancements attached to Petitioner's Case [STEPT-ACT]; this was
17 the greatest part of his sentence, plus, of course, the doubling effect of
18 his prior serious felony, alleged against him. During the sentencing phase,
19 Petitioner's Trial Counsel (Mr. Sanchez) was very concerned about his client
20 being found guilty for all those gang-enhancements. [RT 1101-1103.] If he was
21 so troubled about the gang applicability, why did he not do his
22 homework...Petitioner was not an active gang member during his offenses. He
23 testified to that fact. [RT 1104-1105; and Probation Report 195-196.] As an
24 example of challenges to the [STEP-ACT] enhancements-see-[Garcia v. Carey,
25 Supra, 395 F.3d 1099; considering the date of this cite [2005] it was not
26 opinion until subsequently to, Petitioner's Conviction; however, the
27 cases-cited within was used to affirm the granting of relief, and were
28

1 already published during Petitioner's Trial]. Therefore, Petitioner's Counsel
2 should have found them with minimal effort. Plus, most were in the
3 Prosecutor's [TRIAL MEMORANDUM [EXHIBIT D, pp. 1-27] or could have been
4 discovered with minimal research techniques. His counsel could have proffered
5 objection to or an answer to that, [MEMORANDUM]; could have filed motions in
6 limine, a motion to demurr, or/and a motion to strike in regards to the
7 [STEP-ACT]. [See continuation of specific, [IAC] of arguments within, [PET. at
8 ¶12, of attached p- 28, 29-30.]

9 CONCLUSION

10 Considering all the differential "STANDARD OF REVIEWS," herein possible,
11 we must leave this difficult decision to this Honorable Court, of which
12 STANDARD is the correct one?

13 Additionally, petitioner humbly request this Honorable Court to consider
14 in conjunction with the above, all the rest of the arguments within his
15 Petition.
16

17
18 "Thank you for your time and attention!!!"
19

20 ////

21 ////
22
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*

**

THE HONORABLE CALIFORNIA SUPREME COURT

ORIGINAL PETITION FOR WRIT
OF HABEAS CORPUS
[SEPARATELY BOUND EXHIBITS]

PETITIONER JAVIER ESPINOZA RODRIGUEZ
CALIFORNIA MENS COLONY-EAST 6147
STATE PRISON
P.O. BOX 8101
SAN LUIS OBISPO, CA 93409-8101

RESPONDENT JOHN C. MARSHAL [WARDEN-CMC]

FOURTH APPELLATE DISTRICT, DIVISION ONE,
NO. D049739

**

*

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CLERK'S TRANSCRIPTS ON APPEAL
[ALL IN NUMBERED SEQUENCE: BUT NOT ALL
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REPORTER'S TRANSCRIPTS.

REPORTER'S TRANSCRIPTS AUGMENTATED.

ADDEMDUM [#2]

EXHIBIT H: CALIFORNIA SUPREME COURT DENIAL [POST-CARD, NO-CITE],
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AND ADDENDUM [#2]: GENERALITIES OF THE APPLICABILITES OF CUNNINGHAM,
OF WHICH VIOLATE THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED
STATES CONSTITUTION

EXHIBIT A

Court of Appeal, Fourth Appellate District, Division One - No. D043198
S133875

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JAVIER ESPINOZA RODRIGUEZ, Defendant and Appellant.

Petition for review denied without prejudice to any relief to which defendant might be entitled upon finality of *People v. Black* (2005) 35 Cal.4th 1238 regarding the effect of *Blakely v. Washington* (2004) 542 U.S. ___, 124 S.Ct. 2531, and *United States v. Booker* (2005) 543 U.S. ___, 125 S.Ct. 738, on California law.

SUPREME COURT
FILED

George, C.J., and Baxter, J., were absent and did not participate.

JUL 20 2005

Frederick K. Ohlrich Clerk

DEPUTY

WERDEGAR

Acting Chief Justice

SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,) Court of Appeal
) No. D043198

Plaintiff and Respondent.

)
) Superior Court
) No. SCS176087

v.

JAVIER ESPINOZA RODRIGUEZ,

Defendant and Appellant.

)
)
)
)
)

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY

Honorable Esteban Hernandez. Judge

PETITION FOR REVIEW AFTER THE
UNPUBLISHED DECISION OF THE COURT
OF APPEAL. FOURTH APPELLATE
DISTRICT, DIVISION ONE, AFFIRMING THE
JUDGMENT OF CONVICTION.

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By appointment of the Court of Appeal
under the Appellate Defenders, Inc.
independent-case system

SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	) Court of Appeal
	) No. D03198
Plaintiff and Respondent,)
	) Superior Court
v.	) No. SCS176087
)
JAVIER ESPINOZA RODRIGUEZ,)
)
Defendant and Appellant.)
_____)

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY

Honorable Esteban Hernandez, Judge

PETITION FOR REVIEW AFTER THE
UNPUBLISHED DECISION OF THE COURT
OF APPEAL, FOURTH APPELLATE
DISTRICT, DIVISION ONE, AFFIRMING THE
JUDGMENT OF CONVICTION.

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE,
AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE STATE OF CALIFORNIA.

Defendant and Appellant, Javier Espinoza Rodriguez, petitions for
review following the unpublished decision of the Court of Appeal, Fourth
Appellate District, Division One (per Justice O'Rourke) filed on April 5, 2005.
A copy of the decision is attached to this petition as Exhibit "A."

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO REMOVE A JUROR WHO INDICATED THAT SHE WAS UNSURE WHETHER SHE HAD THE ABILITY TO DECIDE THE CASE BY REFERENCE EXCLUSIVELY TO THE LAW AND THE EVIDENCE.
2. WHETHER THERE WAS SUFFICIENT EVIDENCE TO FIND BEYOND A REASONABLE DOUBT THAT MR. RODRIGUEZ ATTEMPTED TO DISSUADE A WITNESS.
3. WHETHER THERE WAS SUFFICIENT EVIDENCE TO FIND BEYOND A REASONABLE DOUBT THAT THE OFFENSES WERE COMMITTED FOR THE BENEFIT OF, AT THE DIRECTION OF, OR IN ASSOCIATION WITH A CRIMINAL STREET GANG.
4. WHETHER THERE WAS SUFFICIENT EVIDENCE TO FIND BEYOND A REASONABLE DOUBT THAT MR. RODRIGUEZ WAS AN ACTIVE PARTICIPANT OF A CRIMINAL STREET GANG.
5. WHETHER THE ADMISSION OF HEARSAY EVIDENCE BY THE GANG EXPERT VIOLATED MR. RODRIGUEZ' SIXTH AMENDMENT RIGHT TO CONFRONTATION.
6. WHETHER THE TRIAL COURT PREJUDICIALLY ERRED BY ALLOWING EVIDENCE OF MR. RODRIGUEZ' PRIOR CONVICTION.
7. WHETHER THE TRIAL COURT ERRED BY FAILING TO INSTRUCT ON THE LESSER-INCLUDED OFFENSES FOR COUNTS THREE AND FOUR.
8. WHETHER THE IMPOSITION OF CONSECUTIVE SENTENCES BASED ON JUDICIAL FACT FINDING IS VIOLATIVE OF THE SIXTH AMENDMENT.
9. WHETHER THE TRIAL COURT ERRED IN FAILING TO DISMISS

THE STRIKE PRIOR.

10. WHETHER IT WAS ERROR TO INSTRUCT THE JURY PURSUANT TO CALJIC NO. 6.50 BECAUSE IT ALLOWED THE JURY TO GIVE UNDUE WEIGHT TO THE GANG EXPERT.

NECESSITY FOR REVIEW

The lower court denied the appeal holding that, 1) the court did not abuse its discretion by not replacing a distraught juror; 2) substantial evidence supports the jury verdict that the appellant had the specific intent to dissuade a witness because he fired a weapon; 3) the gang enhancement was proven because both the primary activity of the gang was shown and the gang expert's testimony was proper; 4) sufficient evidence was presented to establish that the appellant was currently an active participant in a criminal street gang; 5) appellant's Sixth Amendment right to confrontation was not violated by Investigator Martinez' testimony about the statements made by other officers; 6) the trial court properly admitted appellant's prior burglary conviction to establish the predicate offenses of the gang; 7) any error in failing to give lesser included offense instructions for counts three and four was harmless; 8) the imposition of consecutive sentences did not contravene the Sixth Amendment; 9) the trial court did not abuse its discretion in refusing to strike appellant's strike prior; and 10) CALJIC No. 6.50 did not cause the jury to improperly consider the expert's testimony.

Mr. Rodriguez believes that the Court should grant review because, 1) the lower court fails to justify the trial court's failure to replace Juror No. 7; 2) the lower court does not adequately consider the lack of connection between the appellant's conduct and the specific intent necessary to show dissuading a witness; 3) the lower court does not show that the primary activity of the gang was established, nor that the expert testimony was proper; 4) the lower court fails to consider the evidence that Mr. Rodriguez distanced himself from "Sidro", and currently had very limited contact with the gang; 5) the lower court misapprehends the Sixth Amendment violation by focusing on the appellant's statements instead of the out of court declarants, which were the field officers; 6) the lower court's reliance on the limiting instruction to justify the prior bad act evidence is misplaced because the instruction placed undue weight on the prejudicial evidence; 7) the lower court sidesteps the trial court's error in failing to give a lesser included offense instruction for counts three and four, by incorrectly finding the error was harmless; 8) the lower court incorrectly finds there was no Sixth Amendment error in imposing sentence because the sentence did not exceed the total maximum or rely on facts not proven; 9) the lower court did not recognize that the trial court did not properly balance all factors in determining whether or not to strike Mr. Rodriguez strike prior; and 10) the lower court fails to recognize the mandatory language of

CALJIC NO. 6.50, and the conflict with CALJIC NO. 2.80.

STATEMENT OF THE CASE

In a five-count amended information filed August 4, 2003, Javier Espinoza Rodriguez, and co-defendant Jose Luis Leon, were charged in count one with burglary of a motor vehicle in violation of Penal Code section 459¹, in count two with attempting to dissuade a witness from reporting a crime in violation of section 136.1, subdivision (b)(1); in count three with having a concealed firearm in a vehicle while being an active participant of a criminal street gang, in violation of section 12025, subdivision (a)(1); in count four with carrying a loaded firearm while being an active participant of a criminal street gang, in violation of section 12031, subdivision (a)(1); and in count five, co-defendant Leon was charged with resisting an officer, in violation of section 148, subdivision (a)(1). [C.T. 9-13.]² It was alleged in counts one and two that during the commission of those offenses, Mr. Rodriguez was armed with a firearm, within the meaning of section 12022.5, subdivision (a)(1). It further was alleged on all counts that both defendants committed the above offense for

¹ All further references are to the California Penal Code unless otherwise noted.

² "C.T." refers to the Clerk's Transcript filed in this appeal, "R.T." refers to the Reporter's Transcript, and "R.T.A." refers to the Augmented Reporter's Transcript.

the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members in violation of section 186.22, subdivision (b)(1).

Jury trial began in the matter on August 4, 2003, before the Honorable Esteban Hernandez. [C.T. 216.] Trial continued on August 5, August 7, August 12, August 13, and August 14, 2003. [C.T. 216 - 231.] On August 15, 2003, the jury entered guilty verdicts on all counts, but, on count one, found that Mr. Rodriguez had not personally used a firearm within the meaning of section 12022.5, subdivision (a)(1). [C.T. 139.]

On August 18, 2003, the Court proceeded with the bifurcated trial on Mr. Rodriguez' prior strike allegation. [C.T. 233.] The Court found true the strike prior as alleged per section 667, subdivisions (b)-(i). [Ibid.]

On October 14, 2003, Mr. Rodriguez appeared for sentencing. [C.T. 235.] The court denied probation and sentenced Mr. Rodriguez as follows: On the principal term, count two, the middle term doubled because of the strike prior for a total term of four years, five years consecutive for the allegation pursuant to section 186.22, and four years consecutive pursuant to section 12022.5(a)(1); on count one, one-third of the middle term doubled because of the strike prior allegation for a total term of 16 months consecutive to count two, and the gang allegation was stayed pursuant to section 654; all other

counts were stayed pursuant to Section 654, resulting in a total term of 14 years, 4 months. [C.T. 235.] The notice of appeal was timely filed on October 31, 2003. [C.T. 205.]

On April 5, 2005, the court of appeal affirmed the conviction and sentence. This petition follows.

STATEMENT OF FACTS

The statement of facts is set forth in the decision, and is incorporated herein by reference. In summary, the case arose on May 11, 2003, when police officers responded to a report that two men had broken into a car, and that one of the men had fired a gun in the air. Upon arriving near the scene, an officer saw a car leaving the area that matched the description of the suspects' vehicle and which contained the two defendants. The officer followed the vehicle for a short distance. Once the officer activated his emergency lights, the vehicle immediately pulled over. Jose Leon, the passenger, attempted to flee the scene, but was apprehended within a short distance.

Mr. Rodriguez, who was the driver of the car, went to trial on the defense of voluntary intoxication, and disputed that he was an active participant of a criminal street gang, or that the offense was committed to benefit a gang. Further facts in the record will be cited in the argument.

ARGUMENT

I.

**REVIEW SHOULD BE GRANTED BECAUSE THE TRIAL COURT
ABUSED ITS DISCRETION WHEN IT FAILED
TO REPLACE A JUROR WHO WAS UNABLE TO
UNEQUIVOCALLY STATE THAT SHE WOULD DECIDE THE
CASE BY REFERENCE EXCLUSIVELY TO THE LAW AND THE
EVIDENCE.**

The trial court erred in failing to remove a juror who was unable to unequivocally state that she would properly perform her duties. Section 1089 provides that “[i]f at any time, whether before or after the final submission of the case to the jury, a juror ... is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate,” In *People v. Compton* (1971) 6 Cal.3d 55, 60, the Supreme Court explained that “the trial court has at most a limited discretion to determine that the facts show an inability to perform the functions of a juror, and that inability must appear in the record as a demonstrable reality.” Here, the court received a note from Juror 7, which read: “I have some concerns regarding the defendants. They look familiar. At first sight, I thought I might have seen them on television (news). The more I look at them, I think it might be somewhere else, and this concerns me. Could it be possible for me to be excused?” [R.T.A. 157.] After receiving the note, the juror further stated, “My instincts say something just

doesn't feel right."....."Your words, of course, make perfect sense, and of course I can do that. Like I said, internally, I'm just not—I don't know. I just don't feel comfortable."..... "Like I said, I don't know them or anything like that. But, you know, I guess my fear would be, easily put, would be fear of retaliation one way or another."....."I don't know what the outcome is going to be. I just have that feeling. And like I said, I thought since I wasn't comfortable with it, like I said, I should speak up." [R.T.A. 157-161.]

The defense made a motion to excuse the juror based on this information. [R.T.A. 162.] The prosecutor stipulated to the Court. [Ibid.] The Court denied the motion despite the fact that the Court recognized that Juror 7 used the word "retaliation". The Court determined: "[I] think the fact that came after listening to the witness, Herrera's testimony, wherein he expresses some fear of retaliation, may have put that thought in her mind, because certainly she did not come forward earlier about recognizing anybody or anything of that nature." [Ibid.] In denying the defense motion, the court determined that Juror 7 would be able to listen to the evidence and follow the court's instructions. However, the court essentially acknowledged that the juror had lied, or at least created a ruse, to be removed from the jury due to fear of retaliation.

The trial court's decision whether or not to discharge a juror under

section 1089 is reviewed for abuse of discretion and will be upheld if supported by substantial evidence; to warrant discharge the juror's bias or other disability must appear in the record as a demonstrable reality. (*People v. Marshall* (1996) 13 Cal.4th 799, 843, 55; *People v. Lucas* (1995) 12 Cal.4th 415, 489.) A juror's misconduct creates a rebuttable presumption of prejudice, and reversal is required if there is a substantial likelihood one or more jurors were improperly influenced by bias. (*In re Hitchings* (1993) 6 Cal.4th 97, 118-119; *People v. Marshall* (1990) 50 Cal.3d 907, 950-951.)

The lower court holds that the court did not abuse its discretion by not removing a juror because the record reflects no demonstrable reality that the juror was unable to perform her duties. [Opn. p. 10]. The lower court does not recognize, however, that there was a significant likelihood that the juror would decide the case based on extraneous matters, and the court erred in failing to dismiss the juror.

The record reflects that the prosecutor recognized the issue presented by a juror who appeared likely to decide the case based on extraneous matters by stipulating to the court upon the defense motion. [RT 162].

The lower court recognizes that the juror's inability to properly perform his or duties must appear in the record as demonstrable reality. [Opn. p. 9]. However, the lower court narrowly relies upon the juror's one statement that

she could decide the case based on the evidence, but ignores the numerous instances where the juror admits that she was afraid of the defendants. (See e.g., RTA 159 [noting fear of retaliation], RTA 159 [acknowledging that fear about involvement in trial stems from the gang-related nature of the case]; RTA 158 ["My instincts say something just doesn't feel right."].)

In sum, the court was presented with a juror who admitted that there was a significant likelihood that extraneous matters would enter into her decisionmaking process. As the court determined in *People v. Hecker* (1990) 219 Cal.App.3d 1238, 1244-45, "An admission by a juror that there is a significant likelihood extraneous matters will enter into the decisionmaking process is ... sufficient to warrant removal of the juror and substitution of an alternate." Therefore, the court abused its discretion in failing to remove Juror No. 7, and the petition should be granted.

II.

THE PETITION FOR REVIEW SHOULD BE GRANTED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH MR. RODRIGUEZ ATTEMPTED TO DISSUADE A WITNESS.

The state presented insufficient evidence that Mr. Rodriguez had the specific intent to dissuade the witnesses from making any report to a peace officer within the meaning of section 136.1, subdivision (b)(1). Instead, the evidence showed that the intoxicated Mr. Rodriguez fired a handgun in the air

after the witnesses stated that they had already called the police. Moreover, the evidence showed that Mr. Rodriguez was approximately 173 feet away from the witnesses when they said that they had called 911 and there was no specific evidence that he could hear the witness. As well, there was never any link shown between the gun shot and the witnesses' past report. Therefore, because the evidence is insufficient to establish that Mr. Rodriguez specifically intended to dissuade a witness from making any report, the conviction for Count one must be dismissed.

The United States Supreme Court has held that "the due process standard ... protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 314-315.)

There was insufficient evidence to establish that Mr. Rodriguez possessed the specific intent to dissuade any witness from testifying. "Section 136.1 proscribes preventing a witness or victim from testifying or doing other enumerated acts." (*People v. McDaniel* (1994) 22 Cal.App.4th 278, 284.) Unless the defendant's acts or statements are intended to affect or influence a potential witness' or victim's testimony or acts, no crime has been committed under this section. (*People v. Ford* (1983) 145 Cal.App.3d

985, 989.) Because the definition refers to a defendant's intent to achieve some further or additional consequence, Section 136.1 is a specific intent crime. (*Id.*, at p. 990.)

Here, the only evidence presented at trial was that Mr. Rodriguez fired a handgun in the air at some point after the witnesses had called the police from 173 feet away. There was no evidence produced at trial that Mr. Rodriguez could have heard the witness or was otherwise aware that the police had been called. Moreover, Mr. Rodriguez was heavily intoxicated at the time.

The lower court holds that substantial evidence supports the conviction because the evidence showed that the appellant fired a shot in response to the witness' statement that he was going to call the police. [Opn. p. 13]. This is incorrect because based on the timing of the action, Mr. Rodriguez' distance from the witnesses, and Mr. Rodriguez' mental state, the evidence is insufficient to establish that Mr. Rodriguez specifically intended to dissuade any witness from testifying.

While the lower court notes that the evidence is viewed in the light most favorable to the verdict, the reviewing court must still find substantial evidence to support the conviction based on the entire record [Opn. p. 12]. (See *People v. Holt* (1997) 15 Cal.4th 619, 667 ["In making this assessment

the court looks to the whole record, not just the evidence favorable to the respondent to determine if the evidence supporting the verdict is substantial in light of other facts.”).) The entire record here fails to show substantial evidence sufficient to support the conviction.

The lower court holds that given the sequence of events the jury could conclude that the purpose of shooting the gun was to threaten the witness with harm. [Opn. p. 14]. Although it is correct that the 911 tape shows that Martin Herrera yelled before the gun was discharged, it does not confirm that Mr. Rodriguez heard what Mr. Herrera said. Mr. Rodriguez was heavily intoxicated and approximately 173 feet away from Mr. Herrera at the time he yelled. Furthermore, it does not establish that Mr. Rodriguez had the specific intent to dissuade a witness from making a report. The petition should therefore be granted.

III.

**REVIEW SHOULD BE GRANTED BECAUSE THERE WAS
INSUFFICIENT EVIDENCE TO ESTABLISH BEYOND A
REASONABLE DOUBT THAT THE OFFENSES WERE
COMMITTED FOR THE BENEFIT OF, AT THE DIRECTION OF,
OR IN ASSOCIATION WITH ANY CRIMINAL STREET GANG.**

The evidence was insufficient to prove that “Sidro” is a criminal street gang or that the offenses were committed for the benefit of, at the direction of, or in association with any criminal street gang. Counts one

through four alleged that Mr. Rodriguez committed the charged offenses within the meaning of Section 186.22, subdivision (b)(1), which enhances the sentence of “any person convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members....” Thus, in order for the enhancement to apply, the prosecution must show the existence of a criminal street gang, and must also show that the offense was committed with the specific intent to benefit the gang. In order to meet its burden on the elements of this enhancement, the state relied solely on a so-called “gang expert”. Martinez’ testimony was insufficient to establish either that “Sidro” is a criminal street gang, or that the above offenses were committed to benefit a criminal street gang.

The lower court holds that the gang enhancement was proven because the primary activity of the gang was shown, and that the testimony of the gang expert was proper. [Opn. pp. 15-18]. This holding is incorrect for two reasons. First, the evidence was insufficient to establish that “Sidro” is a criminal street gang because neither the primary activity nor that gang members repeatedly committed criminal activity was established. Second, the expert testimony was improper and overbroad and could not establish the offenses were committed for the benefit of the gang with the

specific intent to promote criminal conduct by gang members.

A. The Evidence Is Insufficient to Establish That "Sidro" Is a Criminal Street Gang.

The evidence was insufficient to establish that a "primary activity" of the "Sidro" gang was the commission of one or more of the crimes enumerated in section 186.22. The existence of a criminal street gang is an element of section 186.22. (*See Salazar v. Superior Court* (2000) 83 Cal.App.4th 840, 846.) .

The lower court holds that substantial evidence supports the finding that "Sidro" is a criminal street gang. [Opn. p. 17]. Under section 186.22, the state has the burden of proving that a group is a criminal street gang. In order to establish that a group is a criminal street gang, the prosecution must prove, *inter alia*, that the group have as one of its primary activities the commission of an enumerated offense. [RB 25]. The lower court notes: "The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes be one of the group's 'chief' or 'principal' occupations. [Citations.]" [*Ibid*; citations omitted.] Sufficient proof that one of the gang's primary activities is the commission of an enumerated offense can be established by showing that the gang's members consistently and repeatedly have committed the enumerated crimes. [Opn. pp.15-16, citing *People v.*

Sengpadychith (2001) 26 Cal.4th 316].

In this case, the evidence was insufficient to establish either that the “primary activity” of “Sidro” was the commission of an enumerated offense or that members of “Sidro” consistently and repeatedly committed enumerated offenses. The lower court cites the expert testimony, in addition to the evidence providing the commission of the charged crimes, to establish that “Sidro” is a criminal street gang. [Opn. p. 17].

In particular the lower court finds the following testimony to be sufficient to infer the facts at issue:

Prosecutor: Are you aware of what the primary criminal activities is [sic] of Sidro Gang members.

Martinez: Yes.

Prosecutor: And can you please give us what you would consider their primary crime?

Martinez: Well, I look at—I look at ranges, okay? Everything from vandalism up to murder. So they’ve—They’ve met at least on one occasion they met some type within those boundaries. We’re talking about assaults, we’re talking about extortions, we’re talking about burglaries, narcotics involvement, and other types.

[Opn. pp. 16-18, RT 353-354; emphasis added]. The lower court fails to recognize that under the statute, the prosecution, in order to meet its burden that a group constitutes a criminal street gang, must prove that the

group “has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute”. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.) Therefore, the “primary criminal activities” and the “primary crime[s]” of Sidro have no bearing on whether or not “Sidro” constitutes a criminal street gang. The statute focuses exclusively on the “primary activities” of the group, not the primary crimes or primary criminal activities.

In *People v. Sengpadychith*, *supra*, 26 Cal.4th 316, the California Supreme Court explained:

The phrase “primary activities,” as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group’s “chief” or “principal” occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group’s members... “Though members of the Los Angeles Police Department may commit an enumerated offense while on duty, the commission of crime is not a *primary activity* of the department.”

Thus, like the LAPD, the primary crime of “Sidro” may range from vandalism to murder, and that robbery may be common [R.T. 353], but that does not establish that “Sidro” is a criminal street gang.

Contrary to the lower court’s holding, the phrase “primary activity” has significant meaning. In order to establish that a group is a criminal street gang under the statute, the state must prove, in part, that a “primary

activity” of the group is the commission of enumerated acts. Here, the evidence did not establish that the “primary activity” of “Sidro” is the commission of enumerated offenses. Therefore, the evidence was insufficient to establish that “Sidro” is a gang within the meaning of the statute.

Moreover, the evidence was insufficient to establish that “Sidro” is a criminal street gang because there is insufficient evidence that members of “Sidro” consistently and repeatedly committed enumerated criminal offenses. The lower court distinguishes *People v. Perez* (2004) 118 Cal.App.4th 151, from the case at bar by holding that in *Perez*, there was no expert testimony directly linking the enumerated offenses to the defendant’s gang. However, the *Perez* Court concluded that even if the expert’s testimony was applicable and correct, such evidence was “insufficient to establish that ‘the group’s members *consistently* and *repeatedly* have committed criminal activity listed in the gang statute. (*Ibid.*)

There is insufficient evidence to establish that “Sidro” members consistently and repeatedly committed offenses enumerated in the gang statute. Therefore, because there is the absence of proof of this element of the criminal street gang allegation, the petition should be granted.

B. The State Presented Insufficient Evidence That Any Of The Offenses Were Committed For The Benefit Of, At The Direction Of, And In Association With A Criminal Street Gang With The Specific Intent To Promote, Further And Assist In Criminal Conduct By Gang Members.

The convictions in counts one through four must also be reversed because the state presented insufficient evidence that the offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members. The only evidence presented by the state on this issue was the testimony of Martinez. This evidence was insufficient to establish this element for two reasons; first, Martinez' testimony exceeded the scope of permissible expert testimony; and second, Martinez' claims regarding what activities benefit a gang was so broad it became meaningless to prove the allegations in this case.

The lower court holds that the evidence was sufficient to establish that the offenses were committed for the benefit of a criminal street gang with the specific intent to promote criminal conduct by gang members because Martinez' testimony was permissible expert testimony, and that Martinez' claims regarding what activities benefit a gang was sufficient to prove the allegations in this case. [Opn. pp. 20-21]. The lower court fails to consider that in *People v. Killebrew* (2003) 103 Cal.App.4th 644, 657-

658, the court cited numerous cases on expert testimony in gang cases, and determined, that “[n]one of the[] cases permitted testimony that a specific individual had specific knowledge or possessed a specific intent.” In *Killebrew*, an expert witness, through the use of hypothetical questions, “testified to the subjective knowledge and intent of each occupant in each vehicle. Such testimony is much different from the expectations of gang members in general when confronted with specific action.” (*Id.*, at p. 658; emphasis original.)

In this case, Martinez testified that the theft was committed for the benefit of documented gang members for the benefit of the gang, and that the firing of the weapon was also done for the benefit of the gang. This testimony is not proper because it was not based on the expectations of gang members, but on the subjective knowledge and intent of Mr. Rodriguez.

The lower court also rejects Appellant’s argument that Martinez’ testimony was overboard. However, Martinez’ testimony was overboard because he testified that nearly every offense committed by two gang members is committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members, simply because

the two individuals happen to belong to the same gang. [RT 391].

Furthermore, and more importantly, Martinez testified that the offenses in this case were committed for the benefit of a criminal street gang with the specific intent to promote criminal conduct by gang members. [R.T. 366-369]. Therefore, Martinez' testimony was overboard and violative of Mr. Rodriguez' right to due process, and thus the petition should be granted for this reason also.

IV.

REVIEW SHOULD BE GRANTED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH BEYOND A REASONABLE DOUBT THAT MR. RODRIGUEZ WAS AN ACTIVE PARTICIPANT OF A CRIMINAL STREET GANG.

The evidence introduced at trial was insufficient as a matter of law to sustain the convictions in counts three and four for violations of section 12025, subdivision (a)(1), and section 12031, subdivision (a)(1), because both offenses include the element that the defendant be an active gang member. In order to meet its burden on this element, the state must prove: first, that the defendant was an active participant, and second that "Sidro" was a criminal street gang. Here, because there was insufficient evidence that Mr. Rodriguez was an active participant of a criminal street gang, the convictions must be reversed.

Mr. Rodriguez was not an active participant of the "Sidro" gang

because the California Supreme Court has determined, based on its statutory interpretation of section 186.22, subdivision (a), that “actively participates in any criminal street gang” means “involvement with a criminal street gang that is more than nominal or passive.” (*People v. Castaneda* (2000) 23 Cal.4th 743, 747.) Based on this definition, the *Castaneda* Court found that the defendant was actively participating in a criminal street gang because:

In the 14 months before the crimes in this case, Santa Ana police officers on seven occasions saw defendant in the company of known Goldenwest gang members, and on four of these gave him written notice that Goldenwest was a criminal street gang under the [“California Street Terrorism Enforcement and Prevention Act”; Penal Code section 186.20, *et seq.*]. On those occasions, defendant bragged to the officers that he “kicked back” with the Goldenwest gang, a phrase that gang expert Officer Thomas Seafin explained was gang parlance for being associated with or being a member of the gang.

(*Id.*, at pp. 752-753.)

The facts in this case are significantly and materially different. According to Martinez, Mr. Rodriguez only had six contacts in almost three years prior to this offense. Moreover, only one of these contacts had been made in the previous two years, and there were no contacts in 2003. More importantly, a field interview sheet from 2001 reflected that Mr. Rodriguez acknowledged that he **used** to be affiliated with “Sidro”. [R.T. 400.]

Furthermore, the state did not produce any evidence that on any of these occasions police officers warned Mr. Rodriguez about the consequences of being an active participant of a criminal street gang. Such a limited amount of contacts establishes that any involvement Mr. Rodriguez had with "Sidro" was at most only nominal or passive.

In response to Mr. Rodriguez' argument that the evidence introduced at trial was insufficient as a matter of law to sustain the convictions in counts three and four for violations of section 12025, subdivision (a)(1), and section 12031, subdivision (a)(1), the lower court holds that substantial evidence supports the finding that Mr. Rodriguez was an active participant of the "Sidro" gang. [Opn. pp. 25-26]. The lower court holds that Mr. Rodriguez' past association with "Sidro" clearly evidences his current participation. The lower court notes that since 1990, Mr. Rodriguez had over 30 contacts in the CAL/GANGS database, and that Mr. Rodriguez had tattoos associated with "Sidro".

However, the lower court fails to adequately consider the appellant's argument that Mr. Rodriguez only had six contacts in almost three years prior to this offense, or that only one of these contacts had been made in the previous two years, or that there were no contacts in 2003. Nor does the lower court give sufficient weight to the appellant's argument that a field

interview sheet from 2001 reflected that Mr. Rodriguez acknowledged that he **used** to be affiliated with "Sidro". [R.T. 400.]. After all, Mr. Rodriguez' un rebutted testimony was that he is no longer a member of "Sidro".

Finally, the lower court fails to consider that the mere presence of tattoos which are associated with a gang is not sufficient to establish that he or she is an active participant of a criminal street gang. It is the permanent nature of tattoos which makes them so unreliable when they are used for the purpose of establishing that a person is currently an active member of a criminal street gang. Therefore, neither the fact that Mr. Rodriguez used to be a gang member, nor the fact that he permanently marked his body, establish that Mr. Rodriguez was an active participant of "Sidro".

The evidence was insufficient as a matter of law to establish either that "Sidro" is a criminal street gang, or that Mr. Rodriguez was an active participant of "Sidro." The court should therefore grant review.

V.

REVIEW SHOULD BE GRANTED BECAUSE MARTINEZ' TESTIMONY REGARDING THE ALLEGED STATEMENTS MADE BY OFFICERS ABOUT FIELD INTERVIEWS IS VIOLATIVE OF MR. RODRIGUEZ' SIXTH AMENDMENT RIGHT TO CONFRONTATION.

Mr. Rodriguez was denied his fundamental Sixth Amendment right

to confrontation because Martinez testified about statements made by officers about alleged statements from Mr. Rodriguez to police officers.

In the recent United States Supreme Court decision of *Crawford v. Washington* (2004) 124 S.Ct. 1354, 1364, the Court found that it

once again reject[s] the view that the Confrontation Clause applies of its own force only to in-court testimony, and that its application to out-of-court statements introduced at trial depends upon “the law of Evidence for the time being.” [Citations.] Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.

The *Crawford* Court then determined that “even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers falls squarely within that class.”

(*Id.*, at p. 1355; *see* footnote 4 [noting that the court is using the term “interrogation” in its colloquial, rather than any technical legal sense].)

Here, the hearsay in question are the statements in the field reports about statements allegedly made by Mr. Rodriguez during interrogations by police officers.

In response to appellant’s argument that the introduction of hearsay evidence by Martinez violated Mr. Rodriguez’ Sixth Amendment Right to confrontation the lower court holds that the Sixth Amendment is inapplicable when it is the defendant’s own statement at issue. [Opn. p. 27].

However, the declarants at issue are the field officers who made the notes referred by Martinez at trial, not the appellant.

According to the lower court's holding, Mr. Rodriguez' statements, which were contained in the field interview reports, were admissible as a statement by the defendant. [Opn. p. 27]. However, the declarant at issue in this case is not Mr. Rodriguez, but the **officers** who authored the field interview reports. Had those officers testified at trial as to the statements allegedly made by Mr. Rodriguez, then a Sixth Amendment violation would not have occurred. Therefore, because the relevant declarant did not testify, the introduction of the statements was violative of Mr. Rodriguez' Sixth Amendment right to confrontation.

Because the violation of the right to confrontation involves the denial of a constitutional right, the determination of whether reversal is required is evaluated under the "harmless beyond a reasonable doubt" standard of *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824; 17 L.Ed.2d 705]. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1128; *Lilly v. Virginia* (1999) 527 U.S. 116, 139-140.) Here, the only evidence offered to establish that Mr. Rodriguez was an active participant of a criminal street gang was the testimony of Martinez, the majority of which was based on multiple hearsay. Therefore, Mr. Rodriguez' convictions

must be reversed.

VI.

**REVIEW SHOULD BE GRANTED BECAUSE THE TRIAL COURT
ERRED BY ALLOWING IMPROPER
PRIOR ACT EVIDENCE THAT PREJUDICED THE
DEFENDANT'S RIGHT TO A FAIR TRIAL.**

The trial court erred in allowing the state to present evidence of a prior conviction by Mr. Rodriguez. Martinez testified that he was aware that "on April 22nd of 1999, that a documented gang member, defendant Javier Rodriguez, was convicted of residential burglary". [R.T. 358.] The trial court ruled that the state could introduce the evidence in order to establish the predicate offenses, which is a component of one of the elements in Section 186.22, as well as both counts three and four. However, the introduction of the evidence of the prior conviction as a documented gang member constituted inadmissible character evidence, and the prejudicial value outweighed any probative value. Therefore, the trial court erred by admitting the evidence of Mr. Rodriguez' prior conviction.

In response to Mr. Rodriguez' argument that the trial court erred in allowing the state to present evidence of a prior conviction, the lower court holds that the evidence was properly admitted for the limited purpose of establishing that "Sidro" was a criminal street gang and that Mr. Rodriguez was an active participant of the "Sidro" gang. [Opn p. 29]. However, the

introduction of the prior conviction constituted inadmissible character evidence, and violated Mr. Rodriguez' right to a fair trial.

The lower court fails to recognize that the use of a four-year old conviction to establish that Mr. Rodriguez is currently "an active participant" is highly prejudicial. While a limiting instruction was given by the court, the limiting instruction specifically directed the jury to consider the appellant's **past** conviction in determining whether or not he was an **active** participant in "Sidro". Thus, the court erred in weighing the counterbalancing factors under evidence code § 352, because the prejudicial effect outweighed the probative value. Moreover, admission of the prior conviction implicates Mr. Rodriguez' federal constitutional right to due process. The petition should therefore be granted.

VII.

REVIEWS SHOULD BE GRANTED BECAUSE THE COURT ERRED IN FAILING TO GIVE A LESSER INCLUDED OFFENSE INSTRUCTION FOR COUNTS THREE AND FOUR.

The trial court erred by failing to give a jury instruction on the lesser included offenses for counts three and four. Section 12025, subdivision (a)(1), has the following elements: (1) a person must carry a concealed pistol, revolver, or other firearm, (2) which is capable of being concealed

upon the person, (3) within any vehicle, which is under his or her control.

Whereas, Section 12031, subdivision (a)(1), has the following elements: (1) a person carries, (2) a loaded firearm, (3) on his or her person or in a vehicle. Moreover, in this case, in order to elevate both offenses to felonies, the prosecution had the burden of proving that Mr. Rodriguez was an active participant of a criminal street gang. (See Section 12025, subd. (b)(3); Section 12031, subd. (a)(2)(C).) Here, the trial court erred in failing to give, sua sponte, a lesser included offense instruction on counts three and four because there was disputed evidence regarding whether Mr. Rodriguez was an active participant of a criminal street gang.

The trial court erred in failing to instruct the jury on the lesser-included offenses for counts three and four. Section 12025 and 12031 are similar in that they both enhance the punishment for persons who are active participants of criminal street gangs. (See section 12025, subd. (b)(3); see also section 12031, subd. (a)(2)(C).) Here, as discussed above, the only evidence presented by the state that Mr. Rodriguez was an “active participant” of a “criminal street gang” was the testimony of Martinez that Mr. Rodriguez had gang tattoos. Moreover, Mr. Rodriguez testified that he was not an active participant of the “Sidro” gang. Therefore, the trial court committed error by failing to give the instructions even though the evidence

that the offense was less than charged was substantial enough to merit consideration by the jury.

Furthermore, the jurors submitted a question to the court, which stated: "On Count 3, is the charge of concealed weapon by itself? Or is the charge contingent upon being a gang member? Hence, if not a gang member then should we then find having a concealed weapon as a crime?" [R.T. 802.]

There can really be no dispute that the trial court erred by failing to give a jury instruction on the lesser included offenses for counts three and four. Here, the state in its brief acknowledged that the trial court erred in failing to give lesser included offense instructions on counts three and four.

The lower court makes a fundamental error by finding that because the jury convicted the appellant on the greater offenses, it could not be harmful. Of course, if this were the proper test, no defendant could ever prevail when the jury was erroneously denied instructions on the lesser offenses. There would be no issue to appeal if the jury had not convicted on the greater offenses. In other words, every case where an appellate court is reviewing the failure to give instructions on a lesser included offense, there necessarily has been a conviction on the greater offense.

This is directly contrary to the principle that an "error in failing to

instruct a jury on a lesser includes offense is harmless when the jury 'necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions.'" (*People v. Lewis* (2001) 25 Cal.4th 610, 646.) Here, the jury did not necessarily decide the factual questions adversely to the appellant on other counts.

In *Lewis*, the trial court instructed the jury on first degree felony murder and the crimes of robbery and burglary. The court also instructed the jury on theft as a lesser included offense of robbery and burglary, an instruction emphasizing that if defendant formed the intent to steal only after he had entered the victim's apartment and assaulted them, he was guilty of the lesser crime of theft. The jury found Lewis guilty of robbery and burglary, and it found true the special circumstance allegations that defendant killed the victim in the commission of robbery and burglary. Thus, the *Lewis* court concluded that in order to render these verdicts, the jury had to find that defendant had already formed the intent to steal when he entered the victim's apartment and assaulted them, thus necessarily rejecting defendant's version of the events.

Here, the only counts requiring the jury to find that Mr. Rodriguez was an **active participant** of a **criminal street gang** were counts three and four. The enhancement under section 186.22 does not require the jury to

make a finding that the defendant is an **active participant**. Thus, a defendant could be properly convicted of committing an offense for the benefit of a criminal street gang and be acquitted of carry a firearm while being an **active participant** of a criminal street gang. Therefore, in this case, unlike *Lewis*, other jury findings did not establish the facts adversely to the appellant

The convictions for counts three and four should be reversed because there is a reasonable probability that had the court given the lesser-included offense instruction, the jury would not have convicted Mr. Rodriguez for the more serious offenses of possessing and discharging a firearm while being an active participant of a criminal street gang. (*See generally People v. Springfield* (1993) 13 Cal.App.4th 1674, 1681 [finding, where the evidence established that the trial court erred in not giving a lesser-included offense instruction, that the proper remedy was to reverse the conviction and remand the case.].) The petition should therefore be granted.

VIII.

**REVIEW SHOULD BE GRANTED BECAUSE THE IMPOSITION
OF CONSECUTIVE SENTENCES BASED
ON JUDICIAL FACT FINDING IS VIOLATIVE OF THE SIXTH
AMENDMENT.**

On June 24, 2004, the Supreme Court of the United States decided *Blakely v. Washington* (2004) 524 U.S. ___, [124 S.Ct 2351; 159 L.Ed 2d

403. The Court's decision in *Blakely* effectively renders unconstitutional portions of California's determinate sentencing scheme. The sentence imposed in this case is unconstitutional because the sentence imposed by the court was greater than the sentence the court could have imposed based on the jury verdict.

In sentencing Mr. Rodriguez, the court followed the recommendation of probation. [RT 1111.] The probation report found, in part:

In regards to concurrent vs. consecutive sentencing, consecutive sentencing appears appropriate in Counts 1 and 2 per Rule 4.425(a)(1), that the crime and objectives were predominately independent of each other. Additionally that Count 3 and 4 be stayed per PC654 in that it represents the same course of conduct as in the PC12022.5(a)(1) allegation. Furthermore, that the PC186.22(b)(1) allegations in Counts 1,3, and 4 also be stayed per PC 654 in that they present the same course of conduct as the allegation in Count 2.

[CT 197.] Therefore, in sentencing Mr. Rodriguez, the sentencing court made a finding that the "crimes and objectives were predominately independent of each other", which removed the fact finding role from the province of the jury.

The rules governing imposition of consecutive terms violate the *Apprendi* mandate. Section 669 provides that in the absence of special findings by the trial judge, sentences for two or more felonies shall run concurrently. The rule implementing that statute is California Rules of

Court, rule 4.425.

Based on these rules, in order to sentence consecutively rather than concurrently, the trial judge has to find one or more of the factors listed in rule 4.425. None of these factors are presented to or found true beyond a reasonable doubt by a unanimous jury. Consecutive sentencing is an enhanced sentencing power reserved solely to the trial judge based on factors beyond those authorized by the jury verdict alone. As such, the consecutive sentencing scheme in California fails the *Apprendi* test as explained in *Blakely* and thus violates the Sixth Amendment right to a jury trial.

In response to Mr. Rodriguez' argument that the sentence imposed in this case is unconstitutional because the sentence imposed by the court was greater than the sentence the court could have imposed based on the jury verdict, the lower court holds that *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], and *Blakely v. Washington, supra*, 124 S.Ct. 2531, do not apply to consecutive sentences. [Opn. p. 36]. However, Mr. Rodriguez' rights to due process and a fair trial, as recognized by the Supreme Court in *Blakely* and *Apprendi*, apply, in cases such as this, when a defendant's sentence is not supported by the jury verdict alone.

The lower court holds that *Apprendi* was solely concerned with what term could be imposed, on a single challenged count. [Opn p. 16] However, the *Blakely* court specifically found:

In other words, the relevant “statutory maximum” is not the maximum sentence a judge may impose after finding additional facts [to support a sentence enhancement], but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury’s verdict alone does not allow, the jury has not found all the facts “which the law makes essential to the punishment,” [citation omitted], and the judge exceeds his proper authority.

(*Id.*, at p. 2544.) Neither the *Apprendi* nor *Blakely* courts are limited to a singled challenged count, but instead are concerned with the constitutionality of a sentence. Here, the imposition of consecutive terms is violative of *Blakely* because the sentence is greater than the maximum sentence authorized by the jury verdict alone.

Under the Sixth Amendment, all facts used to increase a defendant’s sentence beyond the statutory maximum must be charged and proven to a jury. In *Blakely*, the Court explain that the relevant “statutory maximum” is the “maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” *Blakely v. Washington, supra*, 124 S.Ct. at 2536 (emphasis original).] That is, the jury must find all factual predicates for the punishment to be imposed.

Under a constitutional application of the sentencing scheme, the

appellant should not have been sentenced to a consecutive term on counts one and two. The determining question is whether the jury's verdict alone supported the sentence imposed, in the absence of any additional fact. (*Blakely v. Washington, supra*, at p. 2536.) Here, the imposition of the consecutive terms was a discretionary sentencing act not supported by facts found by the jury beyond a reasonable doubt. In sentencing Mr. Rodriguez, the court followed the recommendation of probation. [RT 1111.] The probation report set forth the findings that "the crime and objectives were predominately independent of each other." [CT 197.] Therefore, in sentencing Mr. Rodriguez, the sentencing court made a finding that the "crimes and objectives were predominately independent of each other", which removed the fact finding role from the province of the jury.

The rules governing imposition of consecutive terms violate the *Apprendi* mandate. Section 669 provides that in the absence of special findings by the trial judge, sentences for two or more felonies shall run concurrently. The rule implementing that statute is California Rules of Court, rule 4.425. Therefore, because the determination of whether or not impose consecutive sentences was based upon judicial fact finding, the imposition of consecutive sentences is violative of the Sixth Amendment.

Under *Blakely*, the denial of the Sixth Amendment right to a jury

trial appears to be a structural error and thus reversible *per se*. However, even if the *Chapman* reversible error analysis is applied, it could not be said beyond a reasonable doubt that the result would be the same. (*Chapman v. California, supra*, 386 U.S. at p. 24.) The facts of this case were in conflict and it could have been found by the jury that the two offenses did not really arise from separate occasions. Therefore, even if a harmless error analysis is required, in this case it cannot be said beyond a reasonable doubt that the jury would have reached the same conclusion as the judge. The petition should therefore be granted.

IX.

**REVIEW SHOULD BE GRANTED BECAUSE THE COURT
ABUSED ITS DISCRETION IN
FAILING TO DISMISS THE STRIKE PRIOR.**

The court failed to properly balance the relevant factors in determining whether Mr. Rodriguez' "strike" prior should have been dismissed. Under section 1385, subdivision (a), a "judge...may, either of his or her own motion or upon the application of the prosecuting attorney, and in the furtherance of justice, order an action to be dismissed." In *Romero*, the California Supreme Court "held that a trial court may strike or vacate an allegation or finding under the Three Strikes law that a defendant has previously been convicted of a serious and/or violent felony, on its own

motion, 'in furtherance of justice' pursuant to...section 1385(a)." (*People v. Williams* (1998) 17 Cal.4th 148, 158). The *Romero* Court further held that "[a] court's discretionary decision to dismiss or to strike a sentencing allegation under section 1385 is" reviewable for abuse of discretion. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 531.) In the recent case of *People v. Carmony* (2004) 14 Cal. Rptr. 3d 880, 886, the California Supreme Court concluded that a court's failure to dismiss or strike a prior conviction allegation is subject to review under abuse of discretion standard.

In deciding whether to dismiss a prior strike under the Three Strikes law, the court must consider the nature and circumstances of the present offense, the prior offenses, and the particulars of the defendant's background, character, and prospects in order to determine whether the defendant may be deemed outside the scheme's spirit, in whole or in part. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) In looking within the scheme of the Three Strikes law, *Williams* cited *Romero's* "balance between the defendant's constitutional rights—which [the court] suggested included the Eighth Amendment to the United State Constitution and article I, section 17 of the California Constitution—and society's legitimate interests...." (*Id.*, at p. 160, citing *People v. Superior Court (Romero)*).

supra, 13 Cal.4th at pp. 530-31.)

The sentencing judge failed to take into account the nature and circumstances of the offense in terms of whether it was within the spirit of the Three Strikes law regarding serious or violent felonies. Mr. Rodriguez' present offenses are for car burglary, witness intimidation, and possession of a firearm. His prior strike offense was for burglary. However, in the years since being released from prison, Mr. Rodriguez left his gang, moved away from his old neighborhood to get away from members of his former gang, began attending drug counseling, got married, had two children, and became a union concrete worker. The sentencing court failed to adequately apply any of the factors required under *Romero*. The court simply concluded that the strike prior would apply. [R.T. 1111.] Therefore, the court abused its discretion in failing to properly weigh the above factors and dismiss a strike prior.

In response to Appellant's argument that the trial court abused its discretion in failing to dismiss a strike prior, the lower court holds that Mr. Rodriguez failed to demonstrate that the sentencing decision was "irrational or arbitrary." [Opn. p. 39]. This is incorrect because by failing to take into account all relevant factors, the court's failure to dismiss the strike priors was arbitrary, and thus an abuse of discretion.

The sentencing judge failed to take into account Mr. Rodriguez' background, character and prospects in determining whether or not he fell outside the Three Strikes spirit. Contrary to the state's contention below, this case is about drug addiction, not gang affiliation. After being released from jail, Mr. Rodriguez moved away from his old neighborhood, attended NA meetings, stopped associating with gang members, and became a union construction worker. On the night of the incident, however, Mr. Rodriguez was under the influence of alcohol and drugs. This is not a case of a "boy" not being able to leave the neighborhood, but a case about a person's addiction to narcotics.

Since being released from jail, Mr. Rodriguez had proven that he was getting his life together. Had the court properly taken into account the fact that Mr. Rodriguez was a father of two children and a union construction worker, it would have determined that Mr. Rodriguez falls outside of the spirit of the Three Strikes law. Therefore, the court abused its discretion in failing to dismiss Mr. Rodriguez' strike prior and the petition should be granted.

X.

**REVIEW SHOULD BE GRANTED BECAUSE THE ERRONEOUS
JURY INSTRUCTION ON THE GANG ENHANCEMENT
MANDATES REVERSAL BECAUSE IT MISLED THE JURY AS TO
THE BURDEN OF PROOF AND THE ELEMENTS OF THE
ENHANCEMENT.**

The trial court committed reversible error by giving conflicting instructions on the gang enhancement allegations charged under Penal Code section 186.22, which lessened the prosecution's burden of proof. In light of the expert's testimony that any crime committed by a gang member would implicate the enhancement, it was error not to instruct that every offense committed by a gang member does not necessitate a true finding. The court's failure to clarify the confusion constituted error for two reasons. First, the language in CALJIC No. 6.50 regarding the consideration of expert testimony undercuts the language in CALJIC 2.80, and combined with the expert's testimony, equated to a directed verdict. Second, the language in CALJIC No. 6.50 that the jury should consider the expert's testimony eviscerated the earlier provision in the instruction, which excludes the occasional commission of an offense.

The charged gang enhancement requires that an offense be committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further and assist in

criminal conduct by gang members. (§ 186.22, subd. (b)(1).) However, because the language in CALJIC No. 6.50 specifically instructed the jury to consider expert testimony, and highlighted Agent Martinez' extremely expansive testimony about gang offenses, the jury could find that any crime committed by a gang member is sufficient to sustain the allegation under section 186.22. Such a finding constitutes a directed verdict, which is a violation of Mr. Rodriguez' Sixth Amendment right to a fair trial and Fourteenth Amendment right to Due Process. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277 [113 S.Ct. 2078, 124 L.Ed.2d 182] ["Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he [or she] may not direct a verdict for the State, no matter how overwhelming the evidence] [Citations omitted].")

The confusion arose here when the court instructed the jury pursuant to CALJIC No. 6.50, which, in relevant part, reads that jurors "should consider expert testimony" when determining if the elements of the gang enhancement have been satisfied. (Emphasis added.) This instruction conflicts with CALJIC No. 2.80, where the jurors are properly instructed that they are not bound by any expert opinion. Because the gang enhancement instruction left the jurors with the impression that they should base their finding of the gang enhancement based on the testimony of

Martinez, it allowed the jury to conclude that the true finding should be sustained because all crimes committed by gang members constitute a violation of section 186.22. This was not only an incorrect statement of law, but was equivalent to a directed verdict, since the jury was left with little choice but to conclude that based on Martinez testimony, the offense was a gang crime within the meaning of section 186.22.

The lower court fails to adequately consider the appellant's argument that a faulty specific instruction cannot be cured by a proper general instruction. Here, the state is correct that CALJIC No. 2.80 properly instructs jurors on the weight that should be given to expert testimony. However, CALJIC No. 2.80 is a general instruction regarding the weight of expert testimony, whereas CALJIC No. 6.80 specifically instructs jurors to consider the expert's testimony in determining whether or not the elements of the gang offenses have been met. Therefore, the jury was given a specific instruction directing them to consider the expert's testimony, Counts three and four, and the allegations attached to all counts, should be reversed. (*See Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors

applied in reaching their verdict.”].)

Moreover, the lower court gives no weight to the mandatory language of CALJIC No. 6.50. The fundamental flaw in the this holding is its reliance on the word “consider” while ignoring the word “should”. According to the lower court, CALJIC 6.50 only suggest that the[jury] **consider** the testimony of the expert, along with the other evidence criminal conduct, in making that specific determination. [Opn. p. 43].

The word **should**, however, has considerable meaning. Currently, CALJIC No. 8.73 instructs:

If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you **should consider** the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation

(Emphasis added). However, the former version of CALJIC No. 8.73 found that evidence of premeditation **may** be considered in determining degree of murder. (*See People v. Cole* (2004) 33 Cal.4th 1158, 1211.) The change from **may** to **should** was made in order to require jurors to consider provocation. Therefore, as CALJIC No. 8.73 reflects, the word **should** has significant meaning.

The instructions in this case, combined with Martinez’ testimony

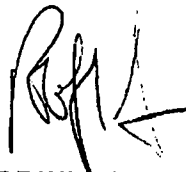
regarding gang crimes, resulted in an unfair trial. Apart from being the functional equivalent of a directed verdict, directing the jury to give special consideration to crucial prosecution evidence implicates due process. Under the Due Process Clause, criminally accused have the right to have the jury find beyond a reasonable doubt every element of the crime. (*In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368].) Here, when the prosecution case rises or falls on a witness' testimony, it is fundamentally unfair for the court to give an instruction bolstering that witness' testimony. (See generally *People v. Fitch* (1997) 55 Cal.App.4th 172 [noting that diluting the prosecution's burden of proof implicates the Due Process Clause].)

Here, the thrust of the state's evidence regarding the gang offenses was presented by Martinez. The Court specifically instructed the jurors to consider Martinez' testimony in determining whether the state had met its burden. The faulty instruction directing the jury to specially consider the state's central evidence establishes, at a minimum, that there is a *reasonable chance* that the jury would have given the expert testimony extra consideration. Therefore, the petition should be granted.

CONCLUSION

For the foregoing reasons, Mr. Rodriguez respectfully requests that the court grant the petition for review so that it can consider the important issues raised herein.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'R. Swain', with a stylized flourish at the end.

Dated: May 11, 2005

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EXHIBIT B

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FILED
Stephan M. Kelly, Clerk

APR 05 2005

Court of Appeal Fourth District

THE PEOPLE,

Plaintiff and Respondent,

v.

JAVIER ESPINOZA RODRIGUEZ,

Defendant and Appellant.

D043198

(Super. Ct. No. SCS176087)

APPEAL from a judgment of the Superior Court of San Diego County, Esteban Hernandez, Judge. Affirmed.

A jury convicted Javier Espinoza Rodriguez of burglary (Pen. Code, § 459; count 1),¹ attempting to dissuade a witness from reporting a crime (§ 136.1, subd. (b)(1); count 2), having a concealed firearm in a vehicle while being an active participant of a criminal street gang (§ 12025, subd. (a)(1); count 3), and carrying a loaded firearm while being an

¹ All statutory references are to the Penal Code unless otherwise specified.

active participant of a criminal street gang (§ 12031, subd. (a)(1); count 4). It further found Rodriguez had personally used the firearm during the commission of count 2 (§ 12022.5, subdivision (a)(1)). In a bifurcated proceeding, the court found Rodriguez had a prior serious or violent felony conviction within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). It sentenced Rodriguez to a total term of 14 years 4 months in state prison.

Rodriguez contends: (1) the court abused its discretion by failing to remove a juror on grounds of bias; (2) the evidence is insufficient to establish he attempted to dissuade a witness; (3) the evidence is insufficient to establish he committed the offenses for the benefit or at the direction of, or in association with any criminal street gang; (4) there is insufficient evidence to prove he was an active participant of a criminal street gang for purposes of counts 3 and 4; (5) his Sixth Amendment confrontation rights were violated by the admission of certain gang expert testimony; (6) the court prejudicially erred by admitting evidence of his prior residential burglary conviction; (7) the court erred by failing to give, sua sponte, lesser included offense instructions on counts 3 and 4; (8) the court violated his Sixth Amendment right to a jury trial by imposing consecutive sentences based on judicial factfinding; and (9) the court abused its discretion when it declined to dismiss his prior strike conviction. In a supplemental brief, Rodriguez further contends the court prejudicially erred by giving conflicting jury instructions on the section 186.22 gang enhancement. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Evidence

At about 2:00 a.m. on May 11, 2003, Laura Limon, her husband Martin Herrera, their son, and Martin's brother, Angel Herrera, were returning home to Angel's Chula Vista apartment after visiting family in Mexico.² When they drove into the parking lot of the apartment complex, Limon and the Herreras noticed a small, dark-colored Ford Explorer with its driver's door open and light on. Limon exited their car and saw a bald, Hispanic individual in a white shirt crouch down to hide in front of Angel Herrera's truck. Hearing noises, Martin and Angel also noticed the man ducking near the truck's grill. Martin identified the man at trial as Rodriguez's codefendant Jose Luis Leon.

Angel walked over to his truck and confronted Leon, asking what he was doing. Leon mumbled something but paying no attention, Angel turned around and said to his brother, "You know what? Just go inside, call the cops. Let them do the work." At her husband's instruction, Limon took her son inside the apartment and called police. Martin Herrera followed his wife to the apartment, but turned and saw Leon break the window of a nearby Volkswagen Jetta. Angel had gone to an upstairs apartment to notify the Jetta's owner that someone was breaking into her car and was returning downstairs when Martin yelled out, "I'm going to call the police. You guys better leave." Both Angel and Martin then heard a gunshot and saw a second man, identified by Martin at trial as Rodriguez,

² At times we refer to the Herreras by their first names. We intend no disrespect by use of this shorthand device.

with his hand raised up in the air. Martin and his wife went inside the apartment and closed the door.

Officer Joseph Picone of the Chula Vista Police Department responded to a radio call about the vehicle burglary; eventually he and other officers detained Leon and Rodriguez, who were found driving away in Rodriguez's green Ford Explorer. Officers retrieved a loaded .22-caliber handgun from Leon's waistband and .22-caliber ammunition from his pockets. They found a spent casing and additional rounds of ammunition in Rodriguez's vehicle. They also found other items, including a gas card and employee badge, later confirmed to have been taken from the Jetta. Officer Picone measured the distance from Angel Herrera's apartment to the parking lot area to be approximately 173 feet.

At trial, the prosecution presented Peter Martinez, an investigator from the San Diego District Attorneys Office, to testify about the gang-related nature of the charged offenses. Martinez explained the background of the San Ysidro-area "Sidro" gang and its culture. He testified that he was aware the primary criminal activities of the Sidro gang included assaults, extortion, burglary, involvement with narcotics, grand theft involving automobiles and robberies. Based on his review of certified records, he also related several criminal convictions that had been suffered by other Sidro gang members in September 2001 and September 2002. Martinez further testified, based on a certified record, that Rodriguez was convicted of residential burglary on April 22, 1999. According to Martinez, Rodriguez was a documented member and active participant in the Sidro gang based on over 30 field interviews that had been conducted by law

enforcement officers. Those interviews showed Rodriguez had admitted being a Sidro gang member to officers on 23 occasions, had at times claimed a gang moniker, had been routinely contacted in areas known for Sidro gang activity and had been contacted in the company of other gang members on five occasions. Martinez also pointed out Rodriguez was wearing gang colors at the time of the offenses, and had three gang-related tattoos: three dots on his left hand, the word "Sidro" on the back of his neck, and the numbers "1925" on both his right arm and stomach area signifying the Sidro gang sign letters "S" and "Y" for San Ysidro. Martinez opined that the defendants, who were documented gang members, committed the charged crimes for the benefit of the gang. In rebuttal, Martinez observed that the apartment complex where the offenses occurred was within the territory of the "Otay" gang, a Sidro rival.

Defense Evidence

Rodriguez testified in his own behalf at trial. He admitted joining the Sidro gang when he was 11 or 12 years old, but stated that after his last prison sentence was over in 1999 he had tired of the gang lifestyle and left San Ysidro. At the time of the offenses, he was attending drug classes twice a week. Rodriguez testified that on the evening in question he met up with Leon to drink, and also took a "date rape" drug that caused memory loss. He and Leon drove around and stopped in the parking lot so Rodriguez could urinate. He could not recall why he grabbed his gun from the back of his vehicle and fired it, other than he was "trying to show off." According to Rodriguez, Leon was not and had never been a member of Sidro "as far as he kn[e]w," but Leon's older brother, with whom Rodriguez used to hang out, was a member.

DISCUSSION

I. The Court Did Not Abuse Its Discretion by Refusing to Discharge Juror No. 7

Rodriguez contends the court abused its discretion when it refused to replace a juror despite grounds to disqualify her for bias. He maintains the juror was "unable to unequivocally state that she would properly perform her duties." The contention is without merit.

A. Background

Before the afternoon session on the first day of testimony in Rodriguez's case, Juror No. 7 sent a note to the court expressing concern that she might have seen the defendants from somewhere other than the television news, and asking if she could possibly be excused. After reading the note to counsel, the court let Juror No. 7 explain, and then proceeded to question her:

"[Juror No. 7]: I was just going to say, at first when – upon first sight, like I said, I thought there was some kind of familiarity, and I thought maybe it could have been from the news. I don't know. I'm thinking it might not be. I don't know if it could be. I don't know them, first of all. But there's just, you know, they look familiar. I don't know where from. I couldn't tell you. I couldn't tell you if it was, you know, from the restaurant down the street. I couldn't tell you where. But it makes me uncomfortable knowing this. I can't give you any specifics. All I can say is I'm just not comfortable with it. I don't know why, you know."

"The Court: Well, let me ask you this, the fact they look familiar and you're not sure where, that does not cause you to prejudice the case, does it?"

"[Juror No. 7]: *No.* No, I'm just – I'm just not comfortable with that, you know. My instincts say something just doesn't feel right.

"The Court: Okay. Now, the fact that you may or may not have seen them in the past, does that affect your ability to look at the evidence and make a determination based simply on evidence that comes in?

"[Juror No. 7]: Just looking, *no, of course.* I mean, I know what you're –

"The Court: And then would you be able to apply the law that I give you, facts, and find them based strictly on the evidence?

"[Juror No. 7]: Your words, of course, make perfect sense, and *of course I can do that.* Like I said, internally, I'm just not – I don't know. I just don't feel comfortable.

"The Court: Okay. But since you're not sure from that context, sensing that there's something more, is there a fear, or is there some other concern?

"[Juror No. 7]: Sure, I guess it could be. Like I said, I don't know them or anything like that. But, you know, I guess my fear would be, easily put, would be fear of retaliation one way or another." (*Italics added.*)

The court held an unreported sidebar conference after which counsel for codefendant Leon questioned the juror:

"[Leon's counsel]: You used the word 'retaliation' a moment ago. Do you remember that? Do you remember using the word 'retaliation?'

"[Juror No. 7]: Yes.

"[Leon's counsel]: That suggests to me that because there's some gang overtones in this case, that you feel perhaps some fear about your involvement in the trial; is that correct?

"[Juror No. 7]: Yes.

"[Leon's counsel]: I guess the real question that we need to know is, do you think that you can set that fear aside as you consider the evidence in this case?

"[Juror No. 7]: I mean, *academically, of course, yes, I can*. But like I said, it just – something just wasn't sitting well we [*sic*] me. And I thought, you know, I should say something.

"[Leon's counsel]: To the best of my knowledge, these men have never been on television. So I don't think you would have seen them because of that. Certainly this case did not get any publicity. [¶] Do you think that your feelings would influence how you decided the issues in this case? Do you think it would make you more prone to find these young men guilty, or more prone to find them not guilty?

"[Juror No. 7]: *No, I can follow those instructions. I can do that*, you know, putting like – *I can separate my emotions from that*. But like I said, something just wasn't sitting we [*sic*] me. And I thought since it was my concern that I should speak up before, you know, I went any further. That's all.

"[Leon's counsel]: We certainly appreciate that. But I think you can understand our concern, is that we need to know that you can listen fairly and objectively to the evidence, and when you go back into the jury room, you can leave aside those feelings,

presume that these gentlemen are not guilty, and just look at the evidence, and see if the evidence convinces you of their guilt. Do you think you can do that?

"[Juror No. 7]: *Yes, I can.* You know, I was sitting here, and I'm thinking, 'Okay. Of course,' like I said, 'I don't know these gentlemen.' I'm thinking, 'yeah, they could be innocent, I don't know. They could be guilty, I don't know.' I don't know what the outcome is going to be. I just have that feeling. And like I said, I thought since I wasn't feeling comfortable with it, like I said, I should speak up.

"[Leon's counsel]: I appreciate that. Thank you very much."

Section 1089 provides in part: "If at any time . . . a juror . . . upon . . . good cause shown to the court is found to be unable to perform his duty, or if a juror requests a discharge and good cause appears therefor, the court may order him to be discharged and draw the name of an alternate. . . ." A juror may properly be discharged if the nature of the case makes it difficult for that juror to keep an open mind so that he or she is actually unable to perform her duty. (*People v. Compton* (1971) 6 Cal.3d 55, 59, disapproved on another point in *People v. Boyette* (2002) 29 Cal.4th 381, 462, fn. 19.) However, if the juror can set aside a general abstract bias and is capable of acting impartially, the juror need not be excused even though he or she may have to make a special effort to be objective. (*People v. Compton, supra*, 6 Cal.3d at pp. 59-60; *People v. Davis* (1972) 27 Cal.App.3d 115, 120.) The juror's inability to perform his or her duty " 'must appear in the record as a "demonstrable reality" and bias may not be presumed.' " (*People v. Beeler* (1995) 9 Cal.4th 953, 975.) The decision whether to retain or discharge a juror rests within the sound discretion of the trial court and will be upheld if supported by

substantial evidence. (*People v. Boyette, supra*, 29 Cal.4th at p. 462; *People v. Beeler*, at p. 975.)

Contrary to Rodriguez's characterization of the evidence, our review of the dialogue between the court, counsel and the juror shows that Juror No. 7 expressed no equivocation about her ability to set aside her discomfort and possible fear of retaliation. She repeatedly unambiguously stated she *could* set aside her feelings and emotions from her task as a juror, while also explaining why she felt the need to raise her concern with the court. The circumstances are not comparable to *People v. Hecker* (1990) 219 Cal.App.3d 1238, cited by Rodriguez, in which the juror was unable to assure the court she could be a fair juror after she recognized the defendant as a visitor to her church. (*Id.* at pp. 1243-1244.) In *Hecker*, following a series of questions, the juror responded, "I don't know" to defense counsel's question, "Can you say you can't be a fair juror now?" (*Id.* at p. 1244.) There, unlike here, the record indicated " 'as a demonstrable reality' " that the juror was unable to perform her duty within the meaning of section 1089. (*Id.* at p. 1245.) Given Juror No. 7's assurances to the court that she could perform her duties and set aside her concerns, the court did not abuse its discretion in declining to discharge her.

Finally we reject Rodriguez's contention, raised for the first time in his reply brief, that the prosecutor's submission of the issue following Juror No. 7's questioning on the matter was a "tacit agreement" with defense counsels' request to excuse that juror. Rodriguez relies on *People v. Overby* (2004) 124 Cal.App.4th 1237 in support of this contention. *Overby*, however, involved a defense counsel's response, "Submit," given

after the court already expressed its tentative decision to reseal a juror. (*Id.* at pp. 1242-1243.) The court held that statement "suggests [counsel's] acquiescence in the remedy *the court proposed.*" (*Id.* at p. 1244.) Here, just before the court issued its decision on the question of Juror No. 7's ability to perform her duty, the prosecution stated, "I'll stipulate to the court." The court then denied defense counsel's motion. The circumstances here are factually distinguishable from *Overby*. Even were we to apply the reasoning of that case, we would conclude that it only establishes the prosecutor's implicit consent to the court's decision to retain Juror No. 7, which the People have not challenged. *Overby* furnishes no basis for reversal.

II. *Substantial Evidence Supports the Conviction of Dissuading a Witness*

Rodriguez contends the evidence is insufficient to support his conviction for dissuading witnesses from making a report to a peace officer under section 136.1, subdivision (b)(1). He argues the evidence does not support the specific intent element of that offense; it shows he fired his handgun only after the Hererras had already called the police, and given his intoxicated state and the 173-foot distance between them, there is no evidence he could hear Martin or even knew he had called police. Rodriguez maintains the prosecution showed no link between his gunshot and Limon's call to police. Again, we reject the contention.

"When an appellant challenges the sufficiency of the evidence to support a conviction, the appellate court reviews the entire record to see 'whether it contains substantial evidence – i.e., evidence that is credible and of solid value – from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt.' "

[Citation.] We view the facts in the light most favorable to the judgment, drawing all reasonable inferences in its support. [Citations.] We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. [Citations.] The test on appeal is not whether we believe the evidence established the defendant's guilt beyond a reasonable doubt, but whether " 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " " (*People v. Cochran* (2002) 103 Cal.App.4th 8, 12-13.) A criminal defendant's specific intent may be proven by circumstantial evidence. (See, e.g. *People v. Lewis* (2001) 25 Cal.4th 610, 642-644.)

Subdivision (b)(1) of section 136.1 makes it a crime to "attempt[] to prevent or dissuade another person who has been the victim of any crime or who is witness to a crime from . . . [m]aking any report of that victimization to any peace officer or state or local law enforcement officer" The statute does not require that the defendant act knowingly or maliciously, nor does it require that any particular words or actions be used by the perpetrator. Indeed, in the context of subdivision (c)(1) of that statute (making it a felony where "the [preventing or dissuading] act is accompanied by force or by an express or implied threat of force"), the court in *People v. Mendoza* (1997) 59 Cal.App.4th 1333 explained: " 'There is, of course, no talismanic requirement that a defendant must say "Don't testify" or words tantamount thereto, in order to commit the charged offenses. As long as his words or actions support the inference that he . . . attempted by threat of force to induce a person to withhold testimony [citation], a defendant is properly' convicted of a violation of section 136.1, subdivision (c)(1)." (*Id.*

at p. 1344, superceded by statute on other grounds as noted in *People v. Franz* (2001) 88 Cal.App.4th 1426, 1441.)

Here, the question is whether Rodriguez's actions support an inference that he attempted to prevent the Hererras from reporting his actions to police within the meaning of section 136.1, subdivision (b)(1). We conclude they do. In making his arguments, Rodriguez ignores our obligation to draw all reasonable inferences in support of the judgment. First, he selectively characterizes the evidence when he argues it shows he fired his gun after the Hererras had already called the police. While that may be true, it fails to acknowledge that both Angel and Martin indicated they heard a gunshot *after* Martin shouted out to the defendants that he was going to call police. Further, it is evident from the transcript of Limon's 911 call played to the jury that the gunshot occurred after either Martin or Angel yelled, "The cops are coming." The jury could reasonably infer that in the early morning hours (just after 2:00 a.m., according to the 911 transcript), Rodriguez would hear Martin's shout even if they were over 170 feet away, and indeed Rodriguez himself testified he could hear someone yell they were calling police from where he was standing. The important point is that a reasonable jury could conclude from the evidence Rodriguez *became aware* of an actual phone call to report the burglary to police *before* he fired his weapon. The jury was free to disbelieve Rodriguez's claim that he only heard someone yell they were going to call police *after* he fired his gun.

Given the sequence of events and the fact the gunshot occurred shortly after Martin's shout, jurors reasonably could infer that Rodriguez's purpose in shooting his

gun, even at a distance away, was to threaten the witnesses with harm if they either proceeded to contact the authorities or did not immediately cut off communications with police. The distance between the parking lot and Angel's apartment does not militate against such a finding, since Rodriguez and Leon had access to Rodriguez's vehicle and could have easily traveled the short distance to Angel's first floor apartment to act on the threat. The evidence thus supports the jury's verdict convicting Rodriguez of dissuading or preventing Limon or the Herreras from reporting his activities to police within the meaning of section 136.1, subdivision (b)(1).

III. *Gang Enhancement*

Rodriguez contends there is insufficient evidence to support the court's imposition of enhanced sentences for committing his crimes "for the benefit of, at the direction of, or in association with, [a] criminal street gang" under section 186.22, subdivision (b). Specifically, he challenges the sufficiency of expert Martinez's testimony with respect to two essential prongs of the gang enhancement: first, that one of the primary activities of the Sidro criminal street gang was an offense enumerated in section 186.22, subdivision (e);³ and second, that the offenses were committed to benefit the gang.

"[T]o subject a defendant to the penal consequences of [section 186.22, subdivision (b)], the prosecution must prove that the crime for which the defendant was convicted had been 'committed for the benefit of, at the direction of, or in association

³ The acts enumerated in subdivision (e) of section 186.22 include robbery, grand theft as defined in subdivision (a) or (c) of section 487, and burglary as defined in section 459. (§ 186.22, subd. (e).)

with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' [Citation.] In addition, the prosecution must prove that the gang (1) is an ongoing association of three or more persons with a common name or common identifying sign or symbol; (2) has as one of its primary activities the commission of one or more of the criminal acts enumerated in the statute; and (3) includes members who either individually or collectively have engaged in a 'pattern of criminal gang activity' by committing, attempting to commit, or soliciting two or more of the enumerated offenses (the so-called 'predicate offenses') during the statutorily defined period." (*People v. Gardeley* (1996) 14 Cal.4th 605, 616-617 (*Gardeley*), emphasis omitted, citing § 186.22, subds. (b)(1), (e) and (f).)

A. *Primary Activities*

People v. Sengpadychith (2001) 26 Cal.4th 316 (*Sengpadychith*) discussed the "primary activity" requirement of section 186.22: "The phrase 'primary activities,' as used in [section 186.22], implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. [Citation.] That definition would necessarily exclude the occasional commission of those crimes by the group's members. . . . 'Though members of the Los Angeles Police Department may commit an enumerated offense while on duty, the commission of crime is not a primary activity of the department. Section 186.22 . . . requires that one of the primary activities of the group or association itself be the commission of [specified] crime[s]. . . . Similarly, environmental activists or any other group engaged in civil disobedience could not be considered a criminal street gang under the statutory definition unless one of the

primary activities of the group was the commission of one of the [25] enumerated crimes found within the statute.'

"Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in *Gardeley*, *supra*, 14 Cal.4th 605. There, a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. (See § 186.22, subd. (e)(4) & (8).) The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on 'his personal investigations of hundreds of crimes committed by gang members,' together with information from colleagues in his own police department and other law enforcement agencies." (*Sengpadychith*, *supra*, 26 Cal.4th at pp. 323-324; see also *People v. Vy* (2004) 122 Cal.App.4th 1209, 1222.) Both past and present offenses are relevant and admissible to show a gang's primary activity. (*Sengpadychith*, at p. 323.)

In the present case, Martinez testified on this point as follows:

"[Prosecutor]: Are you aware of what the primary criminal activities is [*sic*] of Sidro gang members?

"[Martinez]: Yes.

"[Prosecutor]: And can you please give us what you would consider their primary crime?

"[Martinez]: Well, I look at — I look at ranges, okay? Everything from vandalism up to murder. So they've met at least on one occasion they met some type within those boundaries. We're talking about assaults, we're talking about extortions, we're talking about burglaries, narcotics involvement, and other types.

"[Prosecutor]: How about other thefts like grand theft auto?

"[Martinez]: Yes.

"[Prosecutor]: And what about robberies?

"[Martinez]: Yes.

"[Prosecutor]: In your research, do you find that there is one crime that appears to stick out more recently with many of the Sidro gang members than others?

...

"[Martinez]: What I have noticed in the data that I've gathered is that Sidro is involved in a lot of robberies." Martinez went on to testify that three Sidro gang members had each suffered robbery convictions in September 2001, September 2002 and December 1999, and Rodriguez himself had been convicted of residential burglary in April of 1999.

Rodriguez maintains this testimony, while it may demonstrate the Sidro gang's primary *crimes*, does not establish that that organization's primary *activities* are the commission of specified offenses. As *Sengpadychith* explained, an expert's testimony that a particular gang's crimes fall within section 186.22's enumerated offenses does not necessarily establish that the gang's primary *activities* consist of the commission of such crimes. (*Sengpadychith, supra*, 26 Cal.4th at p. 323.) However, here, Martinez testified

that the Sidro gang, which was in existence since before 1994 with over two hundred members, was involved in numerous crimes including burglary and grand theft, as well as "a lot" of robberies. He supported his conclusion by identifying Rodriguez's residential burglary and three such robberies occurring from mid 1999 to the fall of 2002. While Martinez did not provide detailed evidence of the Sidro gang's activities other than those mentioned, the trier of fact could nonetheless reasonably infer from his testimony that the gang's commission of enumerated offenses was not merely "occasional" (*Sengpadychith, supra*, 26 Cal.4th at p. 323), but rather was frequent and repeated.

Rodriguez's reliance on *People v. Perez* (2004) 118 Cal.App.4th 151 and *In re Nathaniel C.* (1991) 228 Cal.App.3d 990 does not persuade us otherwise. In *Perez*, the expert sought to establish that the shooting of an Asian teenager was done in retaliation for actions taken by other Asian gang members, and was thus committed for the benefit of the defendant's Latino gang. He testified that the Latino gang had a longstanding rivalry with Asians and African-Americans, and he was aware of the attempted murder of an Asian boy six years earlier by that gang. He also noted there had been shootings of Asian gang members and an Asian teenager days before the present crime, which were possibly committed by the defendant's gang. (*Perez, supra*, 118 Cal.App.4th at pp. 156-157.) The *Perez* court held that even if the defendant's gang "was responsible for the shootings of Asians on February 16 and 18, as well as the shooting of [the attempted murder victim], such evidence of the retaliatory shootings of a few individuals over of period of less than a week, together with a beating six years earlier, was insufficient to establish that 'the group's members consistently and repeatedly have committed criminal

activity listed in the gang statute.' " (*Id.* at p. 160.) Martinez's testimony, unlike the expert in *Perez*, showed unequivocally that the Sidro gang was responsible for the crimes cited in support of the "primary activities" element of the gang enhancement. (Cf. *People v. Vy*, *supra*, 122 Cal.App.4th at p. 1226, fn. 12.) Further, as we have concluded, Martinez established more than just retaliatory crimes committed in short period of time; his testimony supports the jury's conclusion that the Sidro gang engaged in repeated and frequent statutorily enumerated crimes. As for *In re Nathaniel C.*, the expert's testimony there did not relate to the criminal street gang at issue or its activities, and for that reason (and others) it was held insufficient to prove that gang's primary activities was commission of one or more of the enumerated offenses. (*In re Nathaniel C.*, *supra*, 228 Cal.App.3d at p. 1005.)

B. Crimes Committed to Benefit the Gang

Rodriguez raises two challenges to the evidence supporting the jury's conclusion that the offenses were committed for the benefit of the Sidro gang. First, he argues Martinez's testimony embraced the ultimate issue of Rodriguez's intent and thus exceeded the scope of permissible expert testimony. Second, he maintains Martinez's testimony was so broad as to "eviscerate any standard of conduct for the proscribed activity" and "destroyed any ability to ascertain [his] guilt," thereby violating his right to due process.

As for Rodriguez's attack on the scope of Martinez's testimony, the People counter that Rodriguez did not object to Martinez's opinions on the ground they addressed an ultimate issue in the case, and thereby waived the contentions. We agree Rodriguez forfeited any claim of error as to the propriety of Martinez's opinions by failing to object

on those grounds at trial. (Evid. Code, § 353, subd. (a) [judgment will not be reversed by reason of erroneous admission of evidence unless counsel makes a timely objection and states the specific ground for the objection, or moves to strike the objectionable testimony]; *People v. Valdez* (1997) 58 Cal.App.4th 494, 504-505.)

In any event, we cannot say the court abused its discretion in admitting the evidence. As Rodriguez concedes, expert opinion testimony that embraces the ultimate issue to be decided by the trier of fact is admissible. (Evid. Code, § 805; *Piscitelli v. Friedenber*g (2001) 87 Cal.App.4th 953, 972; *People v. Valdez*, *supra*, 58 Cal.App.4th at p. 507.) In cases involving gang enhancement allegations, courts have repeatedly acknowledged that an expert may properly testify that certain crimes were committed for the benefit of the gang. (See *People v. Killebrew* (2002) 103 Cal.App.4th 644, 657, citing *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224, 1227-1228 [finding sufficient evidence of gang enhancement in part on expert testimony that a "current shooting was committed to benefit or promote [a gang], judging from the fired rounds"]; *In re Ramon T.* (1997) 57 Cal.App.4th 201, 204, 208 [upholding gang enhancement based in part on expert's testimony that the offenses in question "were committed by [the gang] 'to benefit the gang by assisting each other' ".].)

Here, Martinez explained *how* certain crimes benefit a gang: He testified that various theft crimes can benefit the gang because stolen items can be sold and checks or credit cards can be used to purchase items for the gang. He testified that the use of a firearm shows the gang has strength and also intimidates by preventing others from "mess[ing]" with it. He explained that witness intimidation benefits a gang because it can

prevent individuals from testifying in court against the gang. He then testified to his opinion that the present vehicle theft, in which documented gang members took small items including a credit card and identification, was for the benefit of the gang. He reached the same opinion as to the firing of a weapon, and possession of firearms. We disagree that these opinions referred to Rodriguez's subjective knowledge or intent. It is entirely unlike the opinions of the expert in *Killebrew*, who testified that "when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun." (*Killebrew, supra*, 103 Cal.App.4th at p. 652.) The appellate court held this to be an improper opinion concerning the ultimate issue because it was merely the expert's belief that a specific individual (the three occupants of the vehicle) had specific knowledge or possessed as specific intent. (*Id.* at p. 658.) In this case, Martinez's opinions related to a subject – whether the present crimes were committed to benefit or promote the Sidro gang – that was sufficiently beyond common experience so as to assist the jury. (Evid. Code, § 801.) His testimony provides substantial evidence to support the jury's true finding on the gang enhancement allegations.

We likewise disagree that Martinez's testimony on this point was so broad as to violate Rodriguez's due process rights and compel the reversal of his convictions on counts 3 and 4. Rodriguez first maintains Martinez essentially testified that "every act done by a gang member is for the benefit of a street gang." In his reply brief, he narrows this assertion, claiming that Martinez testified that "nearly every offense committed by two gang members is committed for the benefit of . . . a criminal street gang . . . simply

because the two individuals happen to belong to the same gang." Rodriguez points to Martinez's explanation of his testimony that a theft of beer from a convenience store committed by two gang members would be a gang crime. Martinez stated: "[Y]ou're talking about two people that are with the same gang instead of separate gangs, okay? They've conspired to do a crime, okay? And if that crime leads to the benefit to [sic] the gang, no matter how slight, you're talking about it being a gang crime."

Rodriguez cites no authority supporting his general assertion that such testimony "eviscerate[d] any standard of conduct for the proscribed activity" and "destroyed any ability to ascertain [Rodriguez's] guilt." For this reason alone, we may reject his contention. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627 ["[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration"].) Moreover, Rodriguez has ignored additional testimony from Martinez in which he clarified that he assumed in his explanation about the beer theft that the beer was taken back to the gang for consumption. In fact, as the People point out, Martinez acknowledged it was fair to say that not all crimes committed by gang members are gang crimes, and that he would consider all the facts and circumstances (including wearing of gang attire, use of gang signs and shouting of gang names) as well as evidence of the perpetrators' intent at the time of the crime in order to determine whether it was gang related. Reviewing Martinez's testimony in its entire context, we cannot say it was overbroad or deprived Rodriguez of any due process rights.

IV. *Sufficiency of Evidence — Active Participation in a Street Gang (Counts 3 and 4)*

Rodriguez contends the evidence is insufficient to support his convictions in counts 3 and 4 of having a concealed firearm in a vehicle and carrying a loaded firearm. To elevate these crimes to felony offenses, they require proof that they were committed while Rodriguez was an active participant in a street gang. (§§ 12025, subds. (a)(1), (b)(3),⁴ 12031, subds. (a)(1), (2)(C).⁵) Relying on his earlier contentions, Rodriguez first argues there is no evidence Sidro is a criminal street gang within the meaning of section 186.22, subdivision (f) because there is insufficient evidence of the primary activities element. He next argues his law enforcement contacts were too limited and the mere existence of his gang-related tattoos not enough to show current active participation in the gang.

Our rejection of Rodriguez's arguments as to the primary activities prong of section 182.66 disposes of Rodriguez's first argument. As stated in part III (A), *ante*,

⁴ Section 12025, subdivisions (a)(1) and (b)(3) provide in part: "(a) A person is guilty of carrying a concealed firearm when he or she does any of the following: [¶] (1) Carries concealed within any vehicle which is under his or her control or direction any pistol, revolver, or other firearm capable of being concealed upon the person. [¶] . . . [¶] (b) Carrying a concealed firearm in violation of this section is punishable, as follows: [¶] . . . [¶] (3) Where the person is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22 . . . , as a felony."

⁵ Section 12031, subdivisions (a)(1) and (2)(C) provide in part: "(a)(1) A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory. [¶] (2) Carrying a loaded firearm in violation of this section is punishable, as follows: [¶] . . . [¶] (C) Where the person is an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22 . . . , as a felony."

Martinez's testimony constituted sufficient evidence that the primary activity of the Sidro gang were offenses falling within section 186.22, subdivision (e).

Nor are we persuaded by Rodriguez's argument that the evidence presented was insufficient to show he was an active participant in a criminal street gang at the time of the offenses. Section 186.22, subdivision (a)⁶ establishes a substantive offense for "active gang participation where the defendant promotes or assists felonious conduct by the gang." (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467, fn. omitted; see *People v. Jose P.* (2003) 106 Cal.App.4th 458, 466.) The People must prove active participation by demonstrating more than just nominal or passive involvement with a criminal street gang, and it also must show the defendant engages in such participation "with 'knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity,' and that the defendant 'willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang.'" (*People v. Castenada* (2000) 23 Cal.4th 743, 747, 749; see also *People v. Robles* (2000) 23 Cal.4th 1106, 1115; *People v. Jose P.*

⁶ Section 186.22, subdivision (a) provides: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years." Subdivision (A)(2)(C) of section 12031 elevates the crime to a felony where the person is an active participant in a criminal street gang, an identical provision to section 12025, subdivision (b)(3). Where identical language appears in both statutes it should be given the same meaning. (See *People v. Caudillo* (1978) 21 Cal.3d 562, 585, overruled on other grounds in *People v. Escobar* (1992) 3 Cal.4th 740, 749-751 and *People v. Martinez* (1999) 20 Cal.4th 225, 237, fn. 6.)

at p. 466.) A person need not be a gang member to be guilty of violating section 186.22, subdivision (a). (*People v. Jose P.*, at p. 466.)

In making his evidentiary challenge, Rodriguez points to evidence showing he only had six contacts in the three years before the offenses in question, none of which occurred in 2003. He refers to evidence of a field interview from 2001 in which he indicated he was not "claiming" with Sidro any longer, and also to his trial testimony that he was no longer associating with Sidro. Rodriguez finally argues the existence of his gang-related tattoos does not tend to establish his active participation; that the fact at one time he decided to obtain tattoos associated with Sidro is no indication of *present* active participation since the tattoos are permanent and would be apparent even if he had at some point earlier ended his association with Sidro.

Rodriguez takes too narrow a view of the evidence. He neglects evidence that in committing the instant offenses he acted in association with codefendant Leon, who Martinez testified was another documented Sidro gang member with 12 documented gang-related contacts occurring up to April 2003, the month before the present offenses. Rodriguez does not dispute Leon's documented status. Thus, as required by section 186.22, subdivision (a), Rodriguez used the firearm while furthering or assisting a separate felony offense committed by a gang member. (*People v. Castenada*, *supra*, 23 Cal.4th at p. 750; *People v. Robles*, *supra*, 23 Cal.4th at p. 1115.) Moreover, the People's burden was not to show Rodriguez was an active *member* of the Sidro gang, but only to establish that his *involvement* with the gang was more than nominal or passive. (*Castenada*, *supra*, 23 Cal.4th at p. 752.) Nevertheless, the evidence showed Rodriguez

was wearing gang colors at the time of the offense, and his use of the firearm, according to Martinez, benefited the gang in various ways. This evidence, combined with the evidence of Rodriguez's approximately 30 gang-related contacts from 1990 to 2002, his 23 admissions to law enforcement officers over the years that he was a member of Sidro, and his gang-related tattoos, is, in our view, sufficient to establish that Rodriguez's involvement with Sidro at the time of the offenses was more than just nominal or passive.

V. Confrontation Clause

Rodriguez contends he was denied his Sixth Amendment right to confront witnesses against him under *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354] (*Crawford*) when Martinez was permitted to testify about statements other officers made concerning Rodriguez's admissions during field investigations. The People counter that Rodriguez waived the issue by failing to object to introduction of Martinez's testimony at trial, and in any event, *Crawford* does not apply where Rodriguez was the declarant and testified at trial.

We reject the People's waiver argument. *Crawford* had not been decided at the time of trial, and in view of settled law permitting experts to base their opinions on hearsay, there was no reason for his counsel to object to Martinez's testimony. (*People v. Turner* (1990) 50 Cal.3d 668, 703 ["Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change"]; see also *People v. Chavez* (1980) 26 Cal.3d 334, 350, fn. 5.)

Turning to Rodriguez's confrontation clause challenge, we conclude it is without merit. In *Crawford*, the U.S. Supreme Court "repudiated the high court's prior ruling in *Ohio v. Roberts* (1980) 448 U.S. 56, under which an unavailable witness's statements were admissible against a criminal defendant if the statement bore 'adequate "indicia of reliability."' [Citation.] To meet that latter test, evidence had to fall within a 'firmly rooted hearsay exception' or bear 'particularized guarantees of trustworthiness.' [Citation.] In overruling *Roberts*, *Crawford* held that out-of-court statements by a witness that are testimonial are barred under the Sixth Amendment's confrontation clause unless the witness is shown to be unavailable and the defendant has had a prior opportunity to cross-examine the witness, regardless of whether such statements are deemed reliable by the trial court. 'Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rule of evidence, much less to amorphous notions of "reliability." . . . To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.' "*(People v. Monterroso* (2004) 34 Cal.4th 743, 763-764.)

We agree with the People that *Crawford* plainly does not prevent admission of Rodriguez's own statements to officers during field investigations. The *Crawford* court made it clear that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." (*Crawford, supra*, 541 U.S. at p. 38 [124 S.Ct. at p. 1369, fn. 9].)

But Rodriguez argues it is the admission of the *officer's* recorded statements that violates *Crawford*. Citing *People v. Ferguson* (1982) 129 Cal.App.3d 1014, he maintains the field interview sheets are inadmissible hearsay and were offered to prove the truth of the matter asserted. The contention is unavailing. First, in *Ferguson*, the police record was held inadmissible because it was introduced as evidence of the *defendant's* statement, for the truth of his statement about repossessing a vehicle. (*Ferguson*, 129 Cal.App.3d at p. 1024.) As we have just explained, to the extent Martinez relied upon the field interview reports to introduce Rodriguez's statements into evidence, no *Crawford* issue arises. Nor is there a *Crawford* violation to the extent Martinez relied upon the officers' recorded statements, if any, within the reports. *Crawford* did not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions; and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion. In short, the field investigation reports were mentioned only as a basis for Martinez's opinion that Rodriguez was a documented member of the Sidro gang and that his crimes were gang-related. There was no Sixth Amendment violation based on Martinez's reliance on the field investigation reports.

VI. *Prior Bad Act Evidence*

Rodriguez contends the trial court erred by permitting the People to present evidence of his April 22, 1999 residential burglary conviction because it amounted to

inadmissible character evidence, and the evidence was highly prejudicial, rendering it inadmissible under Evidence Code section 352. Rodriguez further asserts the admission of this evidence violated his due process right to a fair trial.

We review Rodriguez's evidentiary challenge for abuse of discretion; to prevail he must demonstrate the court "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; see also *People v. Alvarez* (1996) 14 Cal.4th 155, 201.)

No such abuse occurred here. Evidence of Rodriguez's prior conviction was presented solely for the limited purpose of proving the section 186.22 criminal street gang enhancement, as well as to show Rodriguez was an active participant in the gang for purposes of counts 3 and 4. The trial court twice specifically instructed the jury about the limited purpose of that evidence, first before Martinez related Rodriguez's prior residential burglary conviction, and again before counsel's closing arguments.⁷ Absent evidence to the contrary, the jury is presumed to have understood and followed these instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662; *People v. Marshall* (1996) 13 Cal.4th 799, 864.)

⁷ Just before Martinez's testimony on this point, the court advised the jury as follows: "All right. Ladies and gentlemen, there is certain evidence that is admitted for a limited purpose, and this is one of those. The purpose for which this is admitted is solely the allegation of Penal Code section 186.22, subdivision (b)(1), attached to each of the counts, as well as for counts 3 and 4. So this evidence is admitted solely for that enhancement purpose attached to each count and also limited for consideration on counts 3 and 4, and not to be considered for any other purpose."

Second, we cannot say the prejudicial nature of that evidence was so high as to outweigh its probative value on that issue. We disagree with Rodriguez's argument the evidence was highly prejudicial because the past offense did not tend to show his *current* active participation in Sidro. Courts have taken into account past involvement in crimes as part of the evidence supporting a jury's finding of active participation in a street gang. (See *In re Jose P.*, *supra*, 106 Cal.App.4th at pp. 464, 468 [expert recounted the minor's past arrests for robbery and resisting arrest, and also the minor's arrest in connection with a stolen vehicle in which he acted with his brother, an associate of one subset of the Norteo gang; court relied on this evidence to conclude there was substantial evidence to support the finding the minor was an active participant in the Norteo criminal street gang].) But even assuming the evidence should have been excluded, we would nevertheless conclude the error was harmless. That is, in view of the other evidence supporting the gang enhancement and the active participation prong for counts 3 and 4 (Rodriguez's wearing of gang colors at the time of the crimes; his presence in rival gang territory; his use of a firearm in the commission of the offenses; his association with Leon; his past association with Sidro gang members, use of a moniker and claims of membership to police; and his gang-related tattoos), there is no reasonable probability that any error in allowing Martinez to point out Rodriguez's 1999 burglary conviction affected the jury's verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Finally, we do not reach Rodriguez's conclusory argument that admission of his prior conviction violated his due process right to a fair trial. First, he does not specify how, or in what manner, his due process right is implicated. Moreover, he did not

preserve such an objection at the time evidence of his prior conviction was admitted. " 'It is, of course, "the general rule" ' . . . ' "that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal." ' ' " (*People v. Waidla* (2000) 22 Cal.4th 690, 717.) This forfeiture rule applies to a defendant's failure to object on grounds of federal constitutional provisions. (See *People v. Davis* (1995) 10 Cal.4th 463, 501, fn. 1; *People v. Gordon* (1990) 50 Cal.3d 1223, 1264-1265, overruled on another point in *People v. Edwards* (1991) 54 Cal.3d 787, 835.)

VII. *Failure to Give Lesser Included Offense Instructions — Counts 3 and 4*

Rodriguez contends the court erred in not instructing the jury sua sponte on the misdemeanor offenses of section 12025, subdivision (a)(1) and section 12031, subdivision (a)(1) for counts 3 and 4. He maintains the error was prejudicial based on the weak evidence of his active participation in the Sidro gang, as well as the following question posed by the jury during its deliberations: "On Count 3 — is the charge of concealed weapon by itself? Or is the charge contingent upon being a gang member? Hence, if not a gang member then should we then find having a concealed weapon as a crime?"

"A court must generally instruct the jury on lesser included offenses whenever the evidence warrants the instructions, whether or not the parties want it to do so." (*People v. Horning* (2004) 34 Cal.4th 871, 904-905; citing *People v. Barton* (1995) 12 Cal.4th 186, 196-198.) The People concede the court erred in failing to give instructions on the lesser-included offenses in counts 3 and 4. They maintain, however, the error was invited by

Rodriguez's counsel, and was also harmless in view of the jury's findings, as well as the substantial evidence of Rodriguez's active participation in the Sidro gang.

We need not decide whether Rodriguez's counsel invited the error because we conclude any error was harmless. "Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions." (*People v. Lewis* (2001) 25 Cal.4th 610, 646.) Further, under *People v. Watson, supra*, 46 Cal.2d at p. 836, there must be "a reasonable probability, not a mere theoretical possibility, that the instructional error affected the outcome of the trial." (*People v. Blakeley* (2000) 23 Cal.4th 82, 94, 96, italics omitted.)

By convicting Rodriguez of the offenses in counts 3 and 4, the jury necessarily decided he was an active participant in the Sidro criminal street gang as required by section 186.22, subdivision (a), thus rejecting Rodriguez's defense theory that he had ended his affiliation with the gang. Its finding precluded the possibility of convicting Rodriguez of the lesser included offenses. The jury's question to the court does not indicate it was leaning against a finding of Rodriguez's active participation in the Sidro gang, and indeed, as we have held, there was substantial evidence supporting the jury's finding in that regard. Rodriguez cannot demonstrate prejudice stemming from the court's decision to omit an instruction on the lesser-included offenses of having a concealed firearm in a vehicle and carrying a loaded firearm. (*Lewis, supra*, 25 Cal.4th at p. 646.)

VIII. *Imposition of Consecutive Sentences on Counts 1 and 2*

Rodriguez contends imposition of consecutive sentences on counts 1 and 2 is contrary to *Blakely v. Washington* (2004) 524 U.S. ____ [124 S.Ct. 2531] (*Blakely*) because the court's sentencing decision was based on the nonjury finding that his crimes were predominantly independent of each other. In *Blakely*, the court applied the rule stated in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) to an "exceptional" sentence imposed under a Washington state sentencing scheme. Under *Apprendi*, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) The *Blakely* court explained that the " 'statutory maximum' . . . is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (*Blakely*, 524 U.S. at p. ____ [124 S.Ct. at p. 2537].) "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." (*Ibid.*)

A. *Forfeiture*

We first address and reject the People's argument that Rodriguez forfeited this claim of error by failing to object on this ground at the time of sentencing. They acknowledge the split among appellate courts on this issue, and we note the issue is now before the California Supreme Court. (*People v. Black*, review granted July 28, 2004, S126182.)

" "The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had. . . ." [Citation.] " 'No procedural principle is more familiar to this Court than that a constitutional right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." ' " (*People v. Saunders* (1993) 5 Cal.4th 580, 590, fn. omitted.)⁸ In *People v. Scott* (1994) 9 Cal.4th 331, 351, 353 (*Scott*), the California Supreme Court held a defendant's failure in the trial court to challenge imposition of an enhanced sentence based on erroneous or flawed information waived the issue on appeal. The *Scott* court reasoned that its waiver rule was necessary to facilitate the prompt detection and correction of errors in the trial court, thereby reducing the number of appellate claims and preserving judicial resources. (*Id.* at p. 351; see also *People v. Walker* (1991) 54 Cal.3d 1013, 1023.)

Here, had Rodriguez objected to the court's imposition of consecutive sentences based on its finding, he would not have achieved the purpose of prompt detection or correction in the trial court. This is because before *Blakely*, California courts had held that there was no right to a jury trial in connection with a court's imposition of consecutive sentences. (See e.g. *People v. Groves* (2003) 107 Cal.App.4th 1227, 1230-

⁸ "[T]he terms 'waiver' and 'forfeiture' long have been used interchangeably. As the United States Supreme Court has explained, however, '[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." ' " (*People v. Simon* (2001) 25 Cal.4th 1082, 1097, fn. 9.)

1231.) We conclude application of *Blakely* to Rodriguez's consecutive sentences was sufficiently unforeseeable so as to excuse Rodriguez's lack of objection, or render any objection on that ground futile. (*People v. Welch* (1993) 5 Cal.4th 228, 237-238 ["Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence"].)

We are not persuaded by the People's various arguments, including their reliance on *People v. Marchand* (2002) 98 Cal.App.4th 1056 for the proposition that a defendant waives his right to object on *Apprendi* grounds by failing to object specifically on that ground in the trial court. In *Marchand*, the defendant argued he had been denied his right to due process when the court instead of a jury made the necessary predicate finding for the purpose of having him register as a sex offender under section 290, subdivision (a)(2)(E). On appeal, the court held the defendant waived these claims by not asserting them in the trial court, but it elected to address them anyway because they presented important questions of constitutional law. (*Marchand*, at p. 1061.) The appellate court did not consider whether the defendant waived his jury trial right by failing to assert it in the trial court since the defendant had expressly waived his right to a jury trial, and did not assert the trial court had violated that right. (*Marchand*, at p. 1059.) Thus, we do not find *Marchand* persuasive in deciding whether Rodriguez's *Blakely* claim can be waived by a failure to object on that basis at sentencing.

B. *Blakely* is Inapplicable to Imposition of The Consecutive Sentences Imposed in Counts 1 and 2

Proceeding to the merits of Rodriguez's claim, we disagree that *Blakely* invalidates the consecutive sentences imposed in this case. Imposition of consecutive sentences was not at issue in *Blakely*, and we see no indication *Blakely* was intended to apply in that circumstance. *Blakely* (and also *Apprendi*) was concerned with the finding of a fact " 'that increases the penalty for a crime beyond the prescribed statutory maximum.' " (*Blakely, supra*, 524 U.S. at p. ____ [124 S.Ct. at p. 2536], *Apprendi, supra*, 530 U.S. at p. 490.) In *Apprendi*, the relevant issue was the sentence for a *particular crime*, not the aggregate effect of the defendant's multiple sentences. (*Apprendi, supra*, at p. 474.) Furthermore, *Apprendi* sought to preserve a jury trial right for all facts necessary to constitute a statutory offense, and ensuring they are proven beyond a reasonable doubt. (*Id.* at pp. 483-484.) The consecutive sentencing decision does not involve the facts necessary to constitute a statutory offense. Here, the jury convicted Rodriguez of counts 1 and 2 by a finding beyond a reasonable doubt, and he received no more than the statutory maximum for each conviction.⁹ Imposing those lawful sentences consecutively does not exceed the statutory maximum penalty for any one of his offenses.

⁹ On count 1, the court sentenced Rodriguez to one-third the midterm (8 months), and doubled that sentence to 16 months for his prior strike conviction, and on count 2, to one-third the midterm (2 years) doubled to 4 years due to the section 186.22, subdivision (b)(1) allegation. The court stayed the section 186.22 enhancement on count 1 under section 654.

In addition, there is no presumption of concurrent sentencing in California in the sense that a concurrent term could be construed to be a type of statutory maximum for *Blakely* purposes. When a defendant is convicted of multiple crimes, the trial court has discretion to impose sentence on the subordinate counts consecutively or concurrently. (*In re Hoddinott* (1996) 12 Cal.4th 992, 1000.) Rodriguez points to section 669, which reads in part: "Upon the failure of the court to determine how the terms of imprisonment on the second or subsequent judgment shall run, the term of imprisonment on the second or subsequent judgment shall run concurrently." But this language merely mandates concurrent terms if the court has failed to indicate whether a sentence is to be consecutive or concurrent. It does not create a presumption favoring concurrent terms. (See *People v. Reeder* (1984) 152 Cal.App.3d 900, 923 ["The trial court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing"].) Nor are the provisions of California Rules of Court, rule 4.425 mandatory; while they are criteria affecting the decision to impose consecutive rather than concurrent sentences, they are "guidelines, not rigid rules courts are bound to apply in every case. . . ." (*People v. Calderon* (1993) 20 Cal.App.4th 82, 87.) Thus, a consecutive term does not represent a departure from any standard or presumptive sentencing range. Rodriguez was not denied his due process right to jury trial under *Blakely* by the court's selection of consecutive terms for counts 1 and 2.

IX. Refusal to Dismiss Rodriguez's Prior Strike Conviction

Rodriguez contends the court erred in refusing to strike his April 1999 residential burglary conviction; that the court did not properly balance the relevant factors as

required by *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 531 in making its decision. Specifically, Rodriguez argues the court did not take into account the fact that he left the Sidro gang, moved from his old neighborhood, attended drug counseling, got married and had children and worked as a union contract worker. We disagree.

Section 1385, subdivision (a) permits a trial court to strike an allegation of a prior felony conviction in cases brought under the Three Strikes law. (*Romero, supra*, 13 Cal.4th at pp. 529-530.) The trial court may strike such prior convictions " 'in the furtherance of justice' " so that a defendant is not subject to the statutorily increased penalty. (*Id.* at p. 529.) In so doing, the court must consider both the constitutional rights of the defendant, and the interests of society represented by the People. (*Id.* at pp. 530-531.) That is, the trial court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious . . . or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious . . . or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

"[A] court's failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) In reviewing a trial court's decision under this standard, a reviewing court is guided "by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to

have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." '

[Citations.] Second, a ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377.)

Under *Carmony*, this court must consider the trial court's refusal in light of the legal principles and policies regarding the particular law in which the discretionary exercise of authority was sought. (*Carmony*, at p. 377.)

Rodriguez does not adequately explain why the court's ruling was arbitrary or capricious; he does not point to improper factors considered by the court, nor does he persuasively show the court failed to consider relevant factors. He merely reiterates the evidence, facts and circumstances before the court favorable to him and concludes they require a finding he should be deemed outside the Three Strikes scheme's spirit. Such argument does not adequately demonstrate the court's ruling "falls outside the bounds of reason." (*People v. Williams, supra*, 17 Cal.4th at p. 162.)

Nor was the court's ruling an abuse of discretion. It is of no consequence that the court did not explain its reasoning; section 1385, subdivision (a) does not require the trial court to state reasons for declining to strike a strike. (*People v. Zichwic* (2001) 94 Cal.App.4th 944.) During the sentencing hearing, both Rodriguez and his counsel highlighted the factors that Rodriguez asserts should have compelled striking his

conviction, including Rodriguez's claim that he was no longer a gang member, the fact he moved out of his old neighborhood and supported a wife and two children, and the fact he had a drug problem. The court indicated it had read and considered the probation report, the supplemental probation report, Rodriguez's statement in mitigation and attachments of character letters, and it heard the arguments of counsel. It considered the prosecutor's arguments that Rodriguez continued to associate with gang members, had a history of committing similar crimes, and used a gun in committing the present crimes, one of which, the People point out, was a serious and violent felony. (§§ 667.5, subd.(c)(20); 1192.7, subd.(c)(8).) If we accepted Rodriguez's claims, we would be holding that the court's refusal to strike his 1999 conviction was irrational, capricious, or patently absurd (*People v. Delgado* (1992) 10 Cal.App.4th 1837, 1845) and without even a fairly debatable justification. (*People v. Clark* (1992) 3 Cal.4th 41, 111.) On this record, we cannot reach that conclusion.

Under the circumstances, the court's refusal to strike Rodriguez's prior felony was not so irrational or arbitrary as to be unreasonable, nor did it " 'fall[] outside the bounds of reason.' " (*People v. Carmony, supra*, 33 Cal.4th at p. 377; *Williams, supra*, 17 Cal.4th at p. 162.)

X. Instructional Error

Rodriguez contends the court prejudicially erred by failing to instruct the jury, in response to Martinez's testimony, "that every offense committed by a gang member does not compel a finding that the charged crime was committed for the benefit of the gang." He argues the court compounded its error by giving conflicting jury instructions on the

gang enhancement allegations, namely, CALJIC Nos. 6.50 and 2.80.¹⁰ According to Rodriguez, the latter instructions, combined with Martinez's testimony, equated to directing a guilty verdict and deprived him of his right to due process.

The People assert Rodriguez waived these arguments because he did not object to the giving of CALJIC No. 6.50 or request modification of the instruction. We agree that Rodriguez forfeited any claim that the court should have provided an additional clarifying instruction or "pinpoint" instruction. "[A] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v.*

¹⁰ As read to the jury, CALJIC No. 6.50 provides in part: "Pattern of criminal street gang means [*sic*] the commission of, or attempted commission of, or solicitation of sustained juvenile petition for, or conviction of two or more of the crimes listed above, provided at least one of those crimes occurred after September 26, 1988, and the last of those crimes occurred within three years after a prior offense, and the crimes are committed on separate occasions, or by two or more persons. I[n] determining this issue, you should consider any expert opinion evidence offered as well as evidence of the past or present conduct by gang members involving the commission of one or more of the identified crimes, including the crimes charged in this proceeding. [¶] The People have the burden of proving the truth of this [section 186.22] allegation. If you have a reasonable doubt that this allegation is true, you must find it to be not true."

CALJIC No. 2.80 was read to the jury in part as follows: "In determining what weight to [g]ive to any opinion expressed by an expert witness, you should consider the qualifications and believability of the witness, the facts or materials upon which each opinion is based, and the reasons for each opinion. [¶] An opinion is only as good as the facts and reasons on which it is based. If you find that any fact has not been proved, or has been disproved, you must consider that in determining the value of the opinion. Likewise, you must consider the strengths and weaknesses of the reasons on which it is based. [¶] You are not bound by an opinion. Give each opinion the weight you find it deserves. You may disregard any opinion if you find it to be unreasonable."

Guiuan (1998) 18 Cal.4th 558, 570; see also *People v. Sully* (1991) 53 Cal.3d 1195, 1218.)

As for Rodriguez's second contention – that the language of CALJIC No. 6.50 undercuts the instruction in CALJIC No. 2.80 resulting in a denial of his right to due process in view of Martinez's testimony – we will not find waiver in a matter that assertedly concerns Rodriguez's substantial rights. (§ 1259.) Nevertheless, we are not persuaded the court's instructions confused or mislead the jury, or resulted in a directed verdict.

There are two premises to Rodriguez's contention with which we disagree. The first is Rodriguez's characterization of Martinez's testimony as "extremely expansive" on the issue of the types of crimes sufficient to sustain the allegation under section 186.22 that crimes were committed for the benefit of a street gang. We rejected such an interpretation based on the totality of Martinez's testimony in part III (B), *ante*.

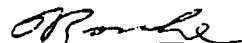
The second is Rodriguez's assertion that the two instructions somehow contradict each other. Rodriguez focuses on the portion of CALJIC No. 6.50 that tells the jury it "should consider any expert opinion evidence" That aspect of the instruction actually addresses the "pattern of gang activity" element of the section 186.22 enhancement, and instructs the jury that it "should consider any expert opinion evidence offered as well as evidence of the past or present conduct by gang members involving the commission of one or more of the identified crimes, including the crimes charged in this proceeding." Rodriguez argues the instruction "left the jurors with the impression that they should base their finding of the gang enhancement" (underlining in original) on

Martinez's testimony, somehow giving his testimony undue weight and eliminating other relevant factors.


There is no conflict in these instructions. The challenged portion of CALJIC No. 6.50 does not advise the jury that it must accept or be bound by an expert's testimony; indeed it does not even pertain to the jury's assessment of that aspect of Martinez's testimony that Rodriguez claims is overbroad, that is, whether Rodriguez's offenses were committed for the benefit of the Sidro gang. The instruction simply directs the jury to *consider* certain evidence in making its determination, which is something different from directing the jury to *adopt* it. Further, consistent with CALJIC No. 6.50, CALJIC No. 2.80 more broadly instructs the jury on *how* to consider the expert's opinion, and it specifically instructs the jury that it must consider whether the facts and reasons on which it is based have been proven, and the strengths or weaknesses of those facts and reasons. (See footnote 10, p. 42 *ante*.) We conclude the court did not err by instructing the jury with CALJIC Nos. 6.50 and 2.80. Rodriguez's claim of instructional error therefore fails on its flawed premises.

DISPOSITION

The judgment is affirmed.

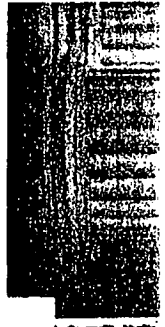

O'ROURKE, J.

WE CONCUR:


McCONNELL, P. J.


NARES, J.

EXHIBIT C



THE STATE BAR OF CALIFORNIA

Tuesday, February 28, 2006

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BENJAMIN SANCHEZ

Benjamin Sanchez - #72505

Current Status: Active

This member is active and may practice law in California.

See below for more details.

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Status History

Effective Date	Status Change
<i>Present</i>	Active
11/25/2005	Active
8/27/2005	Not Eligible To Practice Law

12/22/1976

Admitted to The State Bar of California

Explanation of member status

Actions Affecting Eligibility to Practice Law

Effective Date	Description	Case Number	Resulting Status
	Disciplinary and Related Actions		
8/27/2005	Discipline w/actual suspension	02-O-10355	Not Eligible To Practice Law

Administrative Actions*This member has no public record of administrative actions.*

Copies of official attorney discipline records are available upon request.

Explanation of common actions

California Bar Journal Discipline Summaries

Summaries from the California Bar Journal are based on discipline orders but are not the official records. Not all discipline actions have associated CBJ summaries. Copies of official attorney discipline records are available upon request.

August 27, 2005

BENJAMIN SANCHEZ [#72505], 68, of Bonita was suspended for one year, stayed, placed on three years of probation with a 90-day actual suspension and was ordered to make restitution, take the MPRE within one year and comply with rule 955. The order took effect Aug. 27, 2005.

Sanchez stipulated to four counts of misconduct in two cases.

A solo practitioner in San Diego, he opened a satellite office in Los Angeles in 2000 and hired an office manager whom he authorized to use a general checking account. He did not authorize the woman to use his client trust account. He visited the office once a week.

A client hired him at the Los Angeles office to handle a personal injury case. He never met with or talked to the client, instead communicating with the office manager. Proceeds from a partial settlement were received in Los Angeles and provided to the client.

An additional settlement check for \$606.50 was received in Los Angeles for reimbursement for storage and towing expenses incurred by the client. Unbeknownst to Sanchez, the office manager took the funds.

A third settlement check, for \$9,000, went to the Los Angeles office and was deposited in Sanchez' client trust account. Although a check was issued to the client, she never received it. The balance in the trust account fell below the required amount. Sanchez said when he tried to confront the office manager, she vacated the office and disappeared.

He stipulated that he failed to notify a client of receipt of funds or maintain client funds in trust, and by not supervising his employee, he failed to perform legal services competently.

In the second matter, Sanchez employed an individual in 1998 to administer personal injury cases for him in Los Angeles. A client hired him to handle a personal injury case but Sanchez did not file a complaint before the statute of limitations expired. When the client spoke to someone in Sanchez' San Diego office, she was told the case was going well. Sanchez claims he was unaware of his failure at the time.

The client filed a malpractice suit against Sanchez and won a \$28,349 judgment that he has not paid.

He stipulated that he failed to perform legal services competently.

In mitigation, he has no prior record of discipline and he cooperated with the bar's investigation.

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EXHIBIT D

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Attorneys for Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

v.

JOSE LUIS LEON, JAVIER ESPINOZA
RODRIGUEZ,

Defendant.

No. CS176087
DA BAL576

TRIAL MEMORANDUM

Date: 08-04-03
Time: 8:30AM
Dept: 16

Comes now the plaintiff, the People of the State of California, by and through their attorneys, BONNIE M. DUMANIS, District Attorney, SOPHIA G. ROACH, Deputy District Attorney, and respectfully submits the following Trial Memorandum.

DATE TIME AND LOCATION OF INCIDENT

5/11/03 at 2:09AM at 240 Qunitard Street in Chula Vista

WITNESS LIST

Donna Tucker	Martin Herrera
Angel Herrera	Laura Limon
Officer James Petray CVPD	Agent Randy Smith CVPD
Officer Rodney Demetrio CVPD	Officer Jeff Hughes CVPD
Officer Joseph Picone CVPD	Investigator Peter Martinez SDDA

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STATEMENT OF FACTS

On May 11, 2003, Martin Herrera, his brother Angel and his wife/girlfriend Laura were coming home from Tijuana at approximately 2:00AM. They parked in the parking lot for an apartment complex at 240 Quintard in Chula Vista, when they noticed two men breaking into a neighbor's (Donna Tucker) car. They walked towards the apartments and told the suspects that they were going to call police. At that time one of the suspects later identified as Javier Rodriguez shot a gun into the air. Laura Limon was already on the phone with police when the shot was fired. The two men fled the area in a dark colored Ford Explorer.

A nearby patrol officer responded to the call and saw a dark colored SUV leaving the apartment complex parking lot with its lights off. The patrol officer followed the vehicle at a distance and called for back up. Once back up arrived, a felony hot stop was initiated and the SUV pulled to the side of the road. The front passenger got out of the vehicle and attempted to flee on foot. After a short foot pursuit he was apprehended and identified as Jose Leon. Leon had a loaded .22 caliber handgun concealed in his waistband. The driver was identified as Rodriguez. When he was taken into custody he had a lug nut wrench in his pocket. A search of the vehicle revealed an open 12 pack of Corona, numerous .22 caliber rounds, and several items belonging to Donna Tucker including her work ID, credit cards and other miscellaneous property.

The two suspects were identified by the witnesses in a curbside line up. Tucker identified the property taken from her vehicle. Tucker's vehicle had a broken window and a .22 caliber shell casing was found in the parking lot near the location where the shots were fired.

Both defendants are documented Sidro gang members who have been contacted by police on numerous occasions in Sidro hang outs and with other Sidro gang members. Both of them have previously committed serious felonies with other gang members.

MOTIONS**I****IF THE DEFENDANTS TESTIFY, THEY MAY BE IMPEACHED
WITH PRIOR FELONY CONVICTIONS AND TRUE FINDINGS**

"When a defendant testifies on his own behalf, his character as a witness may be

1 impeached in the same manner as any other witness." *Id.* at 618, citing *People v. Pike* (58
2 Cal.2d 70, 93. This means that the defendant can be impeached with evidence of prior acts of
3 moral turpitude. In *People v. Wheeler*, (1992) 4 Cal. 4th 284, 292, the California Supreme Court
4 discussed new amendments to the California Constitution which broadened the scope of
5 admissible evidence. The court found that Evidence Code Sections 787 and 788 no longer
6 preclude the introduction of relevant conduct. In fact, they held that "[s]ection 28(d) makes
7 immoral conduct admissible for impeachment whether or not it produced any conviction, felony
8 or misdemeanor". *Id.* at 297 fn. 7, citing *People v. Castro* (1985) 38 Cal. 3d 301, 314-317.

9 If the defendant Leon testifies, the People will seek to introduce evidence underlying his
10 prior true finding for PC211 from 1999. If defendant Rodriguez testifies, the People will
11 impeach him with his prior PC 459 conviction from 1999.

12 II

13 CHARACTER EVIDENCE IS SUBJECT TO IMPEACHMENT AND REBUTTAL

14 When the defendant . . . has injected the issue of his good moral character into the case
15 by direct testimony, the prosecution may rebut by introducing evidence of the defendant's bad
16 moral character." *People v. Wagner* (1975) 13 Cal. 3d 612, 618. The Evidence Code clearly
17 reflects this rule in section 1102, which states:

18 In a criminal action, evidence of the defendant's character or trait of his character in the
19 form of an opinion or evidence of his reputation is not made inadmissible . . . if such evidence
20 is:

21 (a) Offered by the defendant to prove his conduct in conformity with such character or
22 trait of character.

23 (b) **Offered by the Prosecution to rebut evidence adduced by the defendant under**
24 **subdivision (a).** (Emphasis added.)

25 In the case at hand the defense may be introducing evidence of the defendant's character through
26 special witnesses. If the defendant chooses to introduce such evidence, the People may not be
27 prohibited from introducing character evidence in rebuttal. Additionally, when a defense
28 witness, other than the accused, testifies as to the defendant's character, the People may ask the
29 witness if he has heard of specific acts or conduct of the defendant that might contradict his or

1 her testimony. *Supra*, *People v. Wagner* at 619. So long as the prosecutor is acting in good faith
2 and with the belief that the acts did take place, he or she may ask questions which test the
3 witness' knowledge of the defendant's reputation. *Id.* Questions asked in a "have you heard?"
4 form are acceptable. *Id.*

5 Therefore, the People should be allowed to introduce evidence of the defendant's poor
6 character, in the form of opinion or reputation, should the defendant elicit evidence of his good
7 character. Further, any witnesses who testify as to the defendant's character are subject to cross-
8 examination regarding their knowledge of prior conduct of the defendant.

9 III

10 DEFENDANT'S PRIOR ACTS ARE ADMISSIBLE UNDER SECTION 1101(B)

11 Defendant Leon sustained a juvenile true finding for PC 211 in 1999. The facts of that
12 case reveal a gang-related intent and motive. In the 1999 case the defendant and 3 other Sidro
13 gang members approached a boy on the trolley and demanded his property. When he was
14 reluctant they beat him and took it by force.

15 Evidence Code section 1101(b) permits the introduction of a defendant's prior conduct
16 when it is relevant to prove any fact in dispute other than defendant's disposition to commit an
17 act. This section lists several facts that prior acts may be introduced to prove. Among these are
18 motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or
19 accident. (Evidence Code section 1101(b).) This list is not exhaustive, and evidence may be
20 admitted to prove any fact other than the defendant's disposition to commit the act. *Id.*; *People*
21 *v. Carter* (1993) 19 Cal.App.4th 1236, 1246.

22 The admissibility of evidence of uncharged offenses "depends upon three principal
23 factors: (1) the materiality of the fact sought to be proved or disproved; (2) the tendency of the
24 uncharged crime to prove or disprove the material fact; and (3) the existence of any rule or
25 policy requiring the exclusion of relevant evidence." *People v. Carter supra* at 1246.

26 The People assert that the defendant's prior offense meets all of the criteria required by
27 section 1101(b). The material fact to be proved by admission of this evidence is that the
28 defendant had the specific intent to aid and abet gang related activity and gang members in the
29 commission of criminal activity. This is an element required under the Penal Code section

1 186.22 allegation. The defendant's prior juvenile finding tends to prove this because it is similar
2 in intent and motive. In the prior case the defendant assisted other Sidro gangsters in the
3 commission of a crime. In this case he assisted another Sidro gang member. There is no rule,
4 which excludes such evidence so long as proper techniques are employed to elicit such
5 information.

6 Evidence of a defendant's commission of charged and uncharged criminal acts is
7 admissible to establish motive and/or intent to commit a charged act. *People v. Thompson*
8 (1980) 27 Cal.3d 303, 315, fns. 13, 14. The ultimate fact of intent can be inferred from the
9 intermediate fact of motive. *People v. De Moss* (1935) 4 Cal.2d 469; *People v. Ewoldt* (1994) 7
10 Cal.4th 380. The inference is that in light of the motive in the first event, the motive, and thus
11 the state of mind, of the defendant is the same in the second event. *People v. Robbins* (1988) 45
12 Cal.3d 867, 879-880. Motive is always subject to proof, is material, and wide latitude is
13 permitted in admitting evidence of its existence. (*People v. Pertsoni* (1985) 172 Cal.App.3d
14 369, 375; *People v. Daniels* (1971) 16 Cal.App.3d 36, 46.)

15 In many cases the introduction of other crimes evidence is relevant to prove intent
16 because of the assumption that people act with a similar intent in similar circumstances. The
17 California Supreme Court explained in *People v. Robbins* (1988) 45 Cal.3d 867, at page 879:

18 "We have long recognized 'that if a person acts similarly in similar
19 situations, he probably harbors the same intent in each instance' [citations
20 omitted], and that such prior conduct may be relevant circumstantial evidence of
21 the actor's most recent intent. The inference to be drawn is not that the actor is
22 disposed to commit such acts; instead, the inference to be drawn is that, in light of
23 the first event, the actor, at the time of the second event, must have had the intent
24 attributed to him by the prosecution." (Emphasis in original.)

25 The cases have made it quite clear that the similarity of the crimes is applied as a
26 threshold test where the uncharged crime is offered to prove identity rather than intent.
27 Logically, an inference of identity can be made from evidence of other crimes only where they
28 share a large number of distinctive common marks with the charged crime. (*People v. Matson*
29 (1974) 13 Cal.3d 35, 40; *People v. Nible* (1988) 200 Cal.App.3d 838, 848.)

"However, when the other crime evidence is admitted solely for its

1 relevance to the defendant's intent, a distinctive similarity between the two crimes
2 is often unnecessary for the other crime to be relevant. Rather, if the other crime
3 sheds great light on the defendant's intent at the time he committed that offense it
4 may lead to a logical inference of his intent at the time he committed the charged
5 offense if the circumstances of the two crimes are substantially similar even
6 though not distinctive."

7 (Emphasis in original; *People v. Nible*, *supra*, at pp. 848-849; similarly see *People v. Carter*
8 (1993) 19 Cal.App.4th 1236, 1246.) Stated another way, the California Supreme Court held, in
9 *People v. Robbins*, *supra*, at page 880, "[i]t has been observed that when evidence of an
10 uncharged offense is introduced to prove intent, the prosecution need not show the same
11 quantum of 'similarity' as when uncharged conduct is used to prove identity."

12 To be sure, there are some differences between the defendant's acts, however, what
13 remains the same is his intent to assist other gang members in the commission of violent crimes.
14 Whether it to beat up a victim or to fire shots at witnesses who attempt to notify law
15 enforcement, the defendant's conduct was linked to gang loyalty, assistance of fellow gang
16 members, and ultimately the upholding of public respect of his gang.

17 The law merely requires the defendant's prior conduct be substantially similar to his
18 current offenses for admissibility under 1101(b) as evidence of intent and motive. In this case,
19 the defendant's past motive for use of violence is remarkably similar to that in the present case.
20 Likewise his intent is the same, to assist other gangsters.

21 The admission of prior gang related conduct has been previously admitted in California
22 cases as evidence of motive and intent under Evidence Code section 1101(b). *People v.*
23 *Dominguez*, 121 Cal. App. 3d 481, 498-499, upheld the use of gang membership to prove
24 motive. In *People v. Beyea* (1974) 38 Cal.App.3d 176, the defendant argued that admission of
25 gang membership evidence would have an inflammatory effect on the jury, however, the court
26 determined that membership would be admissible to prove their identity and motive. The
27 appellate court upheld stating, "As proof of the defendants' membership in the Hell's Angels was
28 relevant to proof of motive and was material and necessary, we cannot say that the trial court
29 erred in concluding that the evidence's probative value outweighed its prejudicial effect." *Id.*, at

1 p. 195.

2 The Supreme Court has reiterated that evidence of uncharged offenses may be admissible
3 to show "a larger continuing plan, scheme, or conspiracy, of which the present crime on trial is a
4 part" . . ." (*People v. Thomas* (1978) 20 Cal.3d 457, 464-465 [143 Cal.Rptr. 215, 573 P.2d 433];
5 see also *People v. Sam* (1969) 71 Cal.2d 194, 204-205 [77 Cal.Rptr. 804, 454 P.2d 700]).
6 *People v. Garnica*, 121 Cal. App. 3d 727, 734.

7 Based on the clear admissibility of such acts under Evidence Code section 1101(b) and
8 the overwhelming probative value of such prior acts, the People request admission of the
9 defendant's prior gang related attack. As further discussed below any possible prejudice to the
10 defendant would be negated by the cross-admissibility of such evidence as predicate offenses
11 establishing his documentation as a gang member. The People seek permission to introduce the
12 evidence not only for purposes of showing the defendant is a gang member, but also for the
13 purpose of showing his similar intent and motive for assaulting others on prior occasions.

14 IV •

15 GANG EVIDENCE IS ADMISSIBLE PURSUANT TO PENAL CODE SECTION 186.22

16 I. Introduction

17 Penal Code Section 186.22, otherwise known as the Street Terrorism Enforcement and
18 Prevention (STEP) Act, includes two separate provisions. The first is contained in 186.22(a),
19 and is an offense for knowing participation and willful furtherance of felonious conduct by
20 members of a criminal street gang, as defined in 186.22(f). The offense in 186.22(a) is
21 chargeable as either a felony or misdemeanor. The second provision is a special allegation
22 contained in 186.22(b)(1). This allegation is applicable to felony charges committed for the
23 benefit of any criminal street gang with the specific intent to further criminal conduct by gang
24 members.

25 The legislature has stated, in no uncertain terms, the intent behind the STEP Act and
26 codified its findings in Penal Code Section 186.20.

27 The Legislature, however, further finds that the State of California is in a state of
28 crisis which has been caused by violent street gangs whose members threaten,
29 terrorize, and commit a multitude of crimes against the peaceful citizens of their
neighborhoods. These activities, both individually and collectively, present a clear

and present danger to public order and safety and are not constitutionally protected. . . . It is the intent of the Legislature in enacting this chapter to seek the eradication of criminal activity by street gangs by focusing upon patterns of criminal gang activity and upon the organized nature of street gangs, which together, are the chief source of terror created by street gangs.
Penal Code Section 186.20.

A. Validity

It should be noted at the onset that Penal Code Section 186.22 has survived constitutional scrutiny since 1991. *In Re Alberto R.*, (1991) 235 Cal. App. 3d 1309 is an exhaustive opinion finding that the statute is not void for vagueness, is not an overbroad encroachment into rights of free assembly, is not an equal protection violation, and provides adequate notice for sentence enhancements. Likewise, *People v. Gamez*, (1991) 235 Cal. App. 3d 957 holds Penal Code Section 186.22 is not violative of due process despite the fact that the section does not require the defendant have knowledge of predicate offenses of other members of the gang. In addition, *Gamez* finds the statute is neither vague nor overbroad. *People v. Green*, (1991) 227 Cal. App. 3d 692 is the original examination of the statute's constitutionality, and finds neither vagueness, overbreadth nor due process violations.

B. Expert Testimony

Expert testimony is appropriate for establishing most of the requirements of Penal Code Section 186.22. The clearest delineation of the foundation needed for such testimony is in *People v. Gardeley*, (1996) 14 Cal. 4th 605. *Gardeley* establishes the threshold foundation for qualifying experts on gang activity under Evidence Codes 720 and 801. In *In re Elodio O.*, (1997) 56 Cal. App. 4th 1175 at 1179-80, these were summarized as follows:

1. Conversations with the defendant or the defendant's gang.
2. Conversations with other gang members.
3. Personal investigations of crimes committed by gang members.
4. Information from colleagues and various law enforcement agencies.

People v. Olguin, (1994) 31 Cal. App. 4th 1355 holds a proper foundation for gang

1 experts is satisfied by "personal observations of and discussions with gang members as well as
2 information from other officers and the department's files." *Id.*, at 1370; citing *People v. Gamez*,
3 (1991) 235 Cal. App. 3d 957, 966.

4 The gang expert in forming his or her opinions may rely upon hearsay and other
5 inadmissible evidence. *People v. Gardeley*, *supra*, 14 Cal. 4th at 619. See *In re Fields*, (1990) 51
6 Cal. 3d 1063, 1070, and *People v. Shattuck*, (1895) 109 Cal. 673, 678. A threshold requirement
7 of reliability must be shown through establishing that the expert's opinion is based on material
8 "of a type reasonably relied upon by experts in the particular field in forming their opinions."
9 Cal. Evid. Code Section 801(b); *People v. Montel*, (1993) 5 Cal. 4th 877, 918-19.

10 Proper subjects of expert testimony include the "culture and habits of criminal street
11 gangs" (*People v. Olguin*, (1994) 31 Cal. App. 4th 1355, 1370), and "gang sociology and
12 psychology" (*People v. Gamez*, (1991) 235 Cal. App. 3d 957, 965-66). In addition, most of the
13 substantive requirements of Penal Code Section 186.22 can be met through expert testimony.
14 Specifically, almost the entirety of the requirements in subdivision (f) fall within the scope of
15 expert testimony (*People v. Gardeley*, (1996) 14 Cal. 4th 605, 620), as well as the requirement
16 contained in the 186.22(b)(1) special allegation involving a benefit to the gang (*People v.*
17 *Olguin*, (1994) 31 Cal. App. 4th 1355, 1382-84). Gang experts were used in *People v. Roberts*,
18 (1997) 55 Cal. App. 4th 1073 to testify that gang members are likely to lie for a non-gang
19 member who lived in the same neighborhood. Although this opinion was depublished (but not
20 reversed) on Oct. 3, 1997 in 97 D.A.R. 12519, it gives an indication of the possible scope of
21 gang expert testimony.

22 The California Court of Appeals, Sixth Appellate District, published an exhaustive
23 opinion on the scope and use of gang expert testimony, beginning with the general rule that
24 where a gang allegation is charged, gang expert testimony is admissible. *People v. Valdez*,
25 (1997) 58 Cal. App. 4th 494 relies on *Gardeley* and its progeny to refine and expand the
26 permissive scope of expert testimony. The expert's testimony at trial included relating "at length
27 and in detail, sometimes verbatim, an extensive amount of otherwise inadmissible hearsay from
28 written reports, information learned from others on the street, letters and statements by
29 participants." *Valdez*, *supra*, 58 Cal. App. 4th at 504. Topics testified to include:

- 1 1. The origin and history of Hispanic gangs in California and The United States.
- 2 2. Local gang history.
- 3 3. Characterization of relationships and interaction between
- 4 local gangs.
- 5 4. Gang sociology and psychology.
- 6 5. Gang structure and membership classifications.
- 7 6. Police Department formal criteria for classifying an individual as a gang member.
- 8 7. Expert opinion on whether the defendant is associated with a
- 9 gang, including testifying directly to the opinion of
- 10 whether the defendant is a member of a gang.
- 11 8. Expert opinion on whether the defendant's actions benefited
- 12 a gang.

13 *Valdez, supra*, 58 Cal. App. 4th at 502-04.

14 Although the issue of whether a benefit has been conferred to a gang is a matter of fact
15 for the trier of fact to determine, *Valdez* holds that it is properly the subject of expert testimony
16 if the trial court believes the expert's opinion (going directly to the ultimate issue) will assist the
17 trier of fact. *Id.* at 507. In addition, Evidence Code Section 805 states: [t]estimony in the form of
18 an opinion that is otherwise admissible is not objectionable because it embraces the ultimate
19 issue to be decided by the trier of fact." *Valdez* goes further and allows the expert to testify
20 directly to the ultimate issues of benefit to the gang and membership in that gang, stating "there
21 is no hard and fast rule that the expert cannot be asked a question that coincides with the
22 ultimate issue in the case." *Id.* (citing *People v. Wilson*, (1944) 25 Cal. 2d 341, 349; *People v.*
23 *Brown*, (1981) 116 Cal. App. 3d 820, 827.) *Valdez* then cites several examples where the courts
24 have permitted experts to testify to an ultimate issue in a criminal trial. *See People v. Wilson*,
25 (1944) 25 Cal. 2d 341; *People v. Gardeley*, (1996) 14 Cal. 4th 605; and *People v. Doss*, (1992) 4
26 Cal. App. 4th 1585.

27 *Valdez* affirms the use of hearsay as a foundation of the expert's testimony. In addition,
28 *Valdez* held that the expert may recite otherwise inadmissible hearsay in open court, and the
29 extent of such testimony is limited only by the discretion of the trial court, and reviewable only

1 on an abuse of discretion standard. *Id.* Valdez also remarks that a defense counsel's objection to
2 the credibility and reliability of the use of otherwise inadmissible police reports in open court as
3 a basis for the expert's opinion are not issues for the court, but are "matters for cross-
4 examination." *Id.* at 507, note 11. Finally, Valdez holds that the appropriate remedy for the use
5 of otherwise inadmissible hearsay as a foundation for gang expert testimony is to "admonish the
6 jurors not to consider it for the truth of the matters stated." *Id.* at 511.

7 **II. Penal Code Section 186.22(f): Gang Defined**

8 A Criminal Street Gang is defined in 186.22(f) as "an ongoing organization, association
9 or group of three or more persons, whether formal or informal, having as one of its primary
10 activities the commission of one or more of the criminal acts enumerated in paragraphs (1) to
11 (23), inclusive, of [Penal Code Section 186.22] subdivision (e), having a common name or
12 common identifying sign or symbol, and whose members individually or collectively engage in
13 or have engaged in a pattern of criminal gang activity."

14 Thus, a Criminal Street Gang is identified by showing the following elements:

- 15 1. Ongoing organization of three or more persons with a common
16 name or identifying sign or symbol.
- 17 2. Primary activity is the commission of one of the offenses in
18 Penal Code Section 186.22(e).
- 19 3. Members who individually or collectively engage or have
20 engaged in "a pattern of criminal gang activity."

21 The third element, the "pattern of criminal gang activity," is defined in 186.22(e), along
22 with the enumerated offenses.

23 **A. The Organization**

24 Three or more members may be shown through a variety of sources. In *In re Nathaniel*
25 *C.*, (1991) 228 Cal. App. 3d 990, 1001 this element was met through witness testimony that
26 there were three or more participants in the underlying crime. *Nathaniel C.* also relied upon
27 testimony referring to a membership roll written on a wall and that the members "were capable
28 of concerted action" such as the attempted retaliation which was the underlying incident. In
29 *People v. Gardeley*, (1996) 14 Cal. 4th 605 the California Supreme Court held that this element

1 may be established through expert testimony, so long as the expert is properly qualified.

2 The common name or identifying sign or symbol is likewise easily met. Once again, *In re*
3 *Nathaniel C.*, (1991) 228 Cal. App. 3d 990 requires only that, while the gang at issue was
4 known by at least two names, there exists one name common to the gang's members. No
5 common color or clothing is required (although a common color of clothing or a common style
6 of dress may satisfy this element) and graffiti may be used to establish a common sign. Once
7 again, expert testimony is appropriate under *People v. Gardeley*, (1996) 14 Cal. 4th 605.
8 *Nathaniel C.* refers to "both alternatives" in subsection (f) at page 1001. Accordingly, it is not
9 necessary to show both a common name and a common symbol; simply showing one is enough
10 to satisfy the statute.

11 **B. Enumerated Offenses and Primary Activity**

12 The enumerated offenses in Penal Code Section 186.22(e) include most serious felonies
13 and practically anything involving any drug, except mere possession. Also of note are the
14 inclusion of Penal Code Section 136.1, Intimidation of Witnesses and Victims, and just about
15 any offense involving a firearm except mere possession and reckless discharge (possession by a
16 minor, however, is included).

17 These enumerated offenses are used for two purposes. The first is that the Criminal Street
18 Gang must have as its primary purpose the commission of one or more of these offenses. The
19 second is to establish predicate offenses for the "pattern of Criminal Gang Activity," which will
20 be discussed in the next section.

21 The issue of establishing the element of "primary activity" arose in *People v. Galvan*
22 (1998) 68 Cal. App. 4th 1135. In *Galvan*, the Court of Appeal held that "either prior conduct or
23 acts committed at the time of the charged offenses can be used to establish the 'primary
24 activities' element of the gang enhancement statute." *Id.* at 1140. The court in *Galvan* expressly
25 found that in light of the plain language of the statute, and the California Supreme Court's
26 analysis in *People v. Loebun*, (1997) 17 Cal. 4th 1, an expert may base his opinion of the gang's
27 primary activities entirely upon conduct in the charged offenses. This is a departure from the
28 holding in *In re Elodio O.*, (1997) 56 Cal. App. 4th 1175 and to that extent, *Elodio O.* is
29 disapproved. The remainder of the original *Elodio O.* holding, specifically the discussion of the

1 method of proof of the gang's primary activity, is left untouched by the holding in *Galvan*.
2 Under *Elodio O.*, a properly qualified expert may testify directly to the issue of the primary
3 activity of the gang. The *Elodio O.* court nails this concept down by concluding the following:

4 [A]ctual convictions or proof beyond a reasonable doubt for these past activities
5 was unnecessary. It was sufficient instead to provide credible testimony that the
6 gang is known for committing one or more of the offenses listed [in Penal Code
7 Section 186.22(e)].

8 *In re Elodio O.*, *supra*, 56 Cal. App. 4th at 9975.

9 Thus, a properly qualified expert may establish the primary activity of a gang through
10 opinion testimony going directly to "what is the primary activity of this gang?" or testimony that
11 the gang is known for committing certain offenses.

12 **C. Pattern of Criminal Gang Activity**

13 The "pattern of criminal gang activity" is defined as the "commission of, attempted
14 commission of, or solicitation of, sustained juvenile petition for, or conviction of two or more of
15 the following offenses, provided at least one of these offenses occurred after the effective date of
16 this chapter and the last of these offenses occurred within three years after a prior offense, and
17 the offenses were committed on separate occasions, or by two or more persons." Penal Code
18 Section 186.22(e). This language has been defined and refined by a series of decisions, ending
19 with the recent *People v. Zermeno*, (November 4, 1999) 21 Cal. 4th 927 opinion.

20 The number of incidents required by statute has been defined from the inception of the
21 statute as being either two incidents committed by a single perpetrator or a single incident with
22 multiple participants. *In re Nathaniel C.*, (1991) 228 Cal. App. 3d 990, 1003. In addition, the
23 currently charged offense may be used for the purpose of establishing the pattern of predicate
24 offenses. *People v. Olguin*, (1994) 31 Cal. App. 4th 1355, 1385; *In re Jose T.*, (1991) 230 Cal.
25 App. 3d 1455, 1463; *In re Lincoln J.*, (1990) 223 Cal. App. 3d 322, 328. The prosecution need
26 not prove that the predicate offenses in the pattern of criminal gang activity be "gang related."
27 *People v. Gardeley*, (1996) 14 Cal. 4th 605, 622 (disapproving to that extent *People v. Gamez*,
28 (1991) 235 Cal. App. 3d 957). One must note, however, that if the charged offense is also being
29 used as a predicate offense, the prosecution is not relieved of proving the charged offense is
gang related. *People v. Gardeley*, *supra*, 14 Cal. 4th at 625, note 12. Nor must the prosecution

1 necessarily provide convictions for these offenses or prove them beyond a "competent evidence"
2 standard. *Nathaniel C.*, *supra*, 228 Cal. App. 3d at 1004; *In re Jose T.*, (1991) 282 Cal. App. 3d
3 1455. The predicate offenses must have occurred within three years of each other, one of them
4 (not both) must have occurred after the effective date of the statute: September 23, 1988.
5 *Nathaniel C.*, *supra*, 228 Cal. App. 3d at 1002. No predicate offense may be proven by instances
6 occurring after the charged crime. *People v. Godinez*, (1993) 17 Cal. App. 4th 1363. In addition,
7 the statute does not require two different offenses be committed; two separate commissions of
8 the same offense are sufficient. *Id.*

9 The courts have yet to establish a bright-line between sufficient and insufficient evidence,
10 but a great deal can be learned from the *Nathaniel C.* court's analysis of the two incidents
11 presented before it at trial. The first incident was an assault in a park attributed to the
12 defendant's gang, which had more than one suspect. *Nathaniel C.*, *supra*, 228 Cal. App. 3d at
13 998. The testifying expert's knowledge of the incident was "obtained from police reports" and
14 the officer was not aware of any convictions. *Id.* The court found that this testimony provided
15 "ample proof." *Id.*, at 1003. Alternately, the court found that an incident from which the expert's
16 only information consisted of conversations with other unspecified police officers, was
17 insufficient. *Id.* It appears that hearsay evidence gained from department records and reports is
18 sufficient, while hearsay from non-specific verbal statements is insufficient. In either case, a
19 review of the relevant case law finds the courts rejecting "nonspecific hearsay and arrest
20 information which does not specify exactly who, when, where, and under what circumstances
21 gang crimes were committed." *In re Jose T.*, (1991) 230 Cal. App. 3d 1455, 1462. In contrast,
22 *People v. Gamez*, (1991) 235 Cal. App. 3d 957, 978, note 8, distinguished the proof in its trial
23 from this standard by stating "certified copies of the convictions, combined with the recitation of
24 the facts surrounding those crimes, supplied proof of the 'who, when, where and under what
25 circumstances.'"

26 Other cases have satisfied the predicate offenses standard in other ways. In *Gardeley*, one
27 offense was satisfied through the abstract of a judgment against another unrelated gang member
28 and the currently charged offense. *People v. Gardeley*, *supra*, 14 Cal. 4th at 624. In *People v.*
29 *Ramon T.*, (1997) 57 Cal. App. 4th 201 the prosecution expert testified that "he had personally

1 investigated several cases involving [enumerated] offenses and that he had talked to both
2 Nortenos and rival gang members about the activities of the Nortenos. Moreover, he offered
3 specific testimony about offenses enumerated in section 186.22 which were committed by
4 [defendants] in support of the gang's activities." *Id.*, at 207.

5 In *In re Elodio O.*, *supra*, 56 Cal. App. 1175, the defendant was charged with robbery and
6 assault with a deadly weapon. The court in *Elodio O.* found for the first time that the prosecution
7 had established a predicate pattern of criminal gang activity entirely through the charged
8 offense. *Elodio O.*, *supra*, 56 Cal. App. 4th at 1178-79. The court reasoned that since the
9 charged offense may be considered as a predicate offense, and the statute may be satisfied by a
10 single incident with multiple participants, the underlying offense (assault by a group on an
11 individual) was sufficient in itself.

12 More significantly, the California Supreme Court in *People v. Loeun*, (1997) 17 Cal. 4th
13 1, has given its express blessing to this concept. *Loeun* found the prosecution could establish the
14 predicate offenses through evidence of the defendant's activity in the charged crime, and a
15 fellow gang member's contemporaneous commission of an enumerated offense directed against
16 the same victim. The *Loeun* court, considering the language of Penal Code Section 186.22(e)
17 states:

18
19 This language allows the prosecution the choice of proving the requisite "pattern
20 of criminal gang activity" by evidence of "two or more" predicate offenses
21 committed "on separate occasions" *or* by evidence of such offenses committed "by
22 two or more persons" on the same occasion. Therefore, when the prosecution
23 chooses to establish the requisite "pattern" by evidence of "two or more" predicate
24 offenses committed on a single occasion by "two or more persons," it can, as here,
25 rely on evidence of the defendant's commission of the charged offense and the
contemporaneous commission of a second predicate offense by a fellow gang
member.

Loeun, *supra*, 17 Cal. 4th at 10. (emphasis in original)

26 This decision eliminates the last bastion of resistance to the above concept: the Fifth Appellate
27 District. The only remaining citable case opposing the idea that a pattern may be established
28 entirely by the charged incident resides in the Fifth Appellate District in *In re Leland D.*, (1990)
29 223 Cal. App. 3d 251, and is superseded, to that extent, by the more recent Fifth District ruling

1 in *Elodio O.* and is now overruled to that extent by *Loeun*.

2 Recently, the California Supreme Court defined the scope of the *Loeun* decision in
3 *People v. Zermeno*, (November 4, 1999) 21 Cal. 4th 927. *Zermeno* overturns the Second
4 Appellate District holding that the entire pattern of criminal gang activity may be shown through
5 proof of an offense contained in paragraph (e) of Penal Code Section 186.22 and proof that
6 another person aided and abetted in the commission of that offense. In *Zermeno*, the People
7 established the predicate pattern of two offenses through proof of the commission of the current
8 offense by defendant (Penal Code Section 245) and the defendant's fellow gang member aiding
9 and abetting that offense. Specifically, the uncharged gang member positioned himself between
10 the victim (who at this time was being assaulted by the defendant) and the victim's friends,
11 telling them "Just let them fight one-on-one. Just let them fight." *Zermeno, Id.* "In doing so,
12 [the gang expert] testified, [the uncharged gang member] was 'protect[ing] the back' of
13 defendant, a fellow gang member. By assisting defendant, the actual perpetrator of the assault,
14 'with the intent that the actual perpetrator's purpose be facilitated thereby.'" *Id.* The Supreme
15 Court found that the uncharged gang member could be held accountable for defendant's
16 wrongful act as an aider and abettor. *Id.* (citing *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5 and
17 *People v. Sanchez* (1995) 12 Cal.4th 1, 33.) Most significantly, the Supreme Court also found
18 that the defendant's fellow gang member's criminal liability is "vicarious." *Id.*

19 Citing to Penal Code Section 31 and Section 971, the Court notes that the statutes
20 defining aider and abettor liability refer to a singular offense. Penal Code Section 31 refers to "a
21 crime" and Penal Code Section 971 refers to "the offense." The Court holds that "both statutes
22 describe aider and abettor liability as involving a single offense, the one committed by the
23 perpetrator." *Id.* Applying this to the facts in *Zermeno*, the Court finds "when [defendant] hit
24 [victim] with the beer bottle and [the uncharged gang member] prevented [victim's] friends
25 from coming to his aid, this was just one offense. Accordingly, this conduct did not satisfy the
26 statutory requirement of "two or more" predicate offenses to establish the "pattern of criminal
27 gang activity" under the STEP Act." *Id.*

28 The *Zermeno* Court distinguishes its holding from the holding in *Loeun* as follows:
29

1 This case is distinguishable from *Loeun, supra*, 17 Cal.4th 1, in which the
2 defendant committed an assault with a deadly weapon (a baseball bat)
3 contemporaneously with a fellow gang member's separate assault with a deadly
4 weapon (a tire iron) on the same victim. We concluded in *Loeun* that these actions
5 met the statutory requirement of "two or more offenses" necessary to establish a
6 "pattern of criminal gang activity." (Section 186.22, subd. (e).) Unlike the
7 situation here, *Loeun* involved two separate assaults by two different assailants,
8 each one subject to criminal liability as a direct perpetrator, not merely as an aider
9 and abettor.

10 *Zermeno, supra*.

11 It appears that the Supreme Court holding changes the focus of the analysis of the
12 sufficiency of the predicate offense from the Appellate Court's analysis, which focused solely
13 on whether a prospective gang member may potentially be charged with an offense. The
14 Supreme Court's analysis focuses on whether members of the gang *actually committed* two or
15 more offenses, rather than whether members of the gang *could be charged* with two or more
16 offenses. Therefore, for a single incident to satisfy the entire pattern of predicate gang activity
17 under *Zermeno* and *Loeun*, there must be two separate offenses committed. A prospective co-
18 defendant, who may be liable as a principle for the underlying offense, cannot establish a
19 predicate offense unless that co-participant independently commits an offense enumerated in
20 Penal Code Section 186.22(e).

21 As a final note, the pattern of criminal gang activity falls within the "continuous course of
22 conduct" exception to juror unanimity, and jurors need not unanimously agree on which two
23 predicate offenses establish the pattern of criminal gang activity. *People v. Funes*, (1994) 23
24 Cal. App. 4th 1506.

25 **III. 186.22(b)(1): Special Allegation**

26 Penal Code Section 186.22(b)(1) allows for a special allegation when the defendant's
27 conduct is both felonious and gang related. The statute specifically states that this allegation is
28 only applicable to felonies. Because subsection (b) allegations are much more common than
29 subsection (a) charges, the law has refined the special allegation requirements to a much greater
30 extent. The statute requires that the underlying felony have been committed under both of the
31 following conditions:

1 1. The felony was committed for the benefit of, at the
2 direction of, or in association with any criminal street
3 gang.

4 2. The felony was committed with the specific intent to
5 promote, further, or assist in any criminal conduct by gang
6 members.

7 As an initial matter, for the purposes of section 186.22(b)(1), there is no requirement that
8 the defendant be an "active" member of the gang as in subdivision (a). The court in *People v.*
9 *Ramon T.*, (1997) 57 Cal. App. 4th 201, 207 expressly states: "We decline to read a requirement
10 into subdivision (b) of section 186.22 that violation of the act requires either 'active' or 'current,
11 active' participation in a gang." In addition, there is no requirement that gang members enter into
12 any sort of agreement. *People v. Gamez*, (1991) 235 Cal. App. 3d 957. The term "criminal street
13 gang" in subsection (b)(1) is defined in 186.22(e) and discussed above. Defendant is not entitled
14 to bifurcation of the charges and enhancement. *People v. Martin*, (1994) 23 Cal. App. 4th 76.
15 No court examining this issue has found that a defendant has a right to a bifurcation.

16 **A. Commission of an Offense for the Benefit of, at the Direction of,**
17 **or in Association with Any Criminal Street Gang.**

18 California's most exhaustive analysis of whether a crime was committed for the benefit of
19 a gang lies in *People v. Olguin*, (1994) 31 Cal. App. 4th 1355. The underlying incident is a
20 contracted shooting which was precipitated by the crossing out of gang graffiti. *Olguin* states
21 that "it is difficult to imagine a clearer need for expert explication." *Id.*, at 1384. The court relied
22 on expert testimony to find that the underlying crime of murder for hire benefited the
23 defendant's gang by promoting "respect" for that gang. The expert "explained that 'respect' is
24 often synonymous with fear among gangs, and [the expert's] expertise enabled him to recognize
25 the benefit [defendant's gang] would realize from the fact another gang called upon one of its
26 members when it needed serious muscle." *Id.* The court found that if the crime promoted
27 "respect" for itself or its members, a sufficient benefit has accrued to the gang and the
28 underlying crime is sufficient for 186.22(b)(1) enhancement. (Factual emphasis was also placed
29 on a lack of "a prior relationship between the killers and their victim, and no reason for

1 animosity other than gang-related insults." *Id.*, at 1382-83.) In addition, the *Olguin* court found
2 expressly that expert testimony on the issue of a benefit accruing to a gang was appropriate. *Id.*
3 at 1185.

4 *People v. Ramon T.*, (1997) 57 Cal. App. 4th at 202-08 found a crime to be committed in
5 association with a criminal street gang based solely on testimony that several gang members
6 acted in concert, and did not require proof that any of the members be active participants in the
7 gang. *People v. Gamez*, (1991) 235 Cal. App. 3d 957, 978 found a sufficient act in a retaliatory
8 shooting against a rival gang member who was in the defendant's "territory." Several gang
9 members mistakenly identifying and assaulting a passer-by as a rival gang member was
10 sufficient in *People v. Elodio O.*, (1997) 56 Cal. App. 1175.

11 *People v. Gardeley*, (1996) 14 Cal. 4th 605, 620 relies upon expert testimony that an
12 assault by gang members on a non-gang member in the gang's territory was a "'classic' example
13 of gang-related activity, explaining that criminal street gangs rely on such violent assaults to
14 frighten the residents of an area where the gang members sell drugs, thereby securing the gang's
15 drug-dealing stronghold." The *Gardeley* court found that a collateral result of this assault was
16 that local residents would be frightened by the activity, and this collateral, unintended and
17 incidental consequence of the commission of the underlying crime was sufficient to establish a
18 benefit to the gang. *Id.* In addition, under the reasoning in *Elodio O.* and *Gamez* the fact that
19 there was more than one gang member involved in the assault would similarly satisfy the "in
20 association with" alternative. *In re Jose T.*, (1991) 230 Cal. App. 3rd 1455 found that the
21 underlying crime (attempted murder) was gang related since it was directed toward a rival gang
22 member. In *People v. Ortiz*, (1997) 57 Cal. App. 4th 480 the Court of Appeals relied upon
23 expert testimony that a robbery committed by gang members who left graffiti associated with a
24 rival gang, was "pay back." *Id.*, at 484, note 3. The expert testified that the defendants were
25 attempting to frame a rival gang, and the court found that "it cannot be seriously disputed" that
26 the crime was committed for the benefit of the gang and that it was committed with the specific
27 intent to promote, further, or assist criminal gang behavior. *Id.* at 484.

28 In sum, it appears that the threshold for showing this prong of 186.22(b)(1) is fairly low.
29 It has been satisfied on minimal evidence such as the presence of more than one member of the

1 gang, where violence was directed at a rival gang member and where an unintended collateral
2 effect of the crime could be fear. It is important to note that no court has required proof of *actual*
3 fear or even an actual observation of the crime by a third party who may or may not then
4 become afraid. Every court to reach this issue has consistently relied upon expert testimony.

5 **B. The Specific Intent to Promote, Further, or Assist in**
6 **any Criminal Conduct by Gang Members.**

7 The most recent application of this element appears in *People v. Ramon T.*, (1997) 57
8 Cal. App. 4th 201, 208. Testimony showed the defendants had assaulted a police officer in an
9 attempt to free their friend/gang-member from the officer's grasp. *Id.*, at 208. The defense
10 argued that the specific intent to promote, further, or assist in any criminal conduct by gang
11 members was not shown. The court strongly disagreed, saying "a series of assaults and batteries
12 committed to free a gang member (appellant) from the grasp of an officer effecting a lawful
13 arrest strikes us as having unequivocally been committed with the intent of promoting,
14 furthering *and* assisting in the criminal conduct of all three juveniles." *Id.* (emphasis in original)

15 Specific intent has readily been shown through expert testimony and the circumstances
16 surrounding the underlying incident. "Evidence of gang activity and affiliation is admissible
17 where it is relevant to issues of motive and intent." *People v. Funes*, (1994) 23 Cal. App. 4th
18 1506, 1518. Gang expert testimony, specifically involving gang psychology and the significance
19 of certain actions (such as throwing gang signs, shouting slogans, crossing out graffiti, and
20 wearing certain colors in certain neighborhoods, etc . . .) as well as expected reactions from
21 other gang members, is an important part of this element. Intent may be shown through past
22 dealings between the gangs at issue and through general principles that tend to guide gang
23 behavior. See *People v. Olguin*, (1994) 31 Cal. App. 4th 1355, 1369-80. Additionally, pursuant
24 to *People v. Croy*, (1985) 41 Cal. 3d 1, 12 note 5, and the *Olguin* decision, specific intent that
25 the charged crime be committed does not need to be shown. *Olguin* extrapolated the *Croy*
26 holding into a gang context and held: "no specific intent is required for liability as an aider and
27 abettor other than the intent to aid, encourage, facilitate or promote a criminal act. If that intent
28 is shown, it matters not that the crime actually committed was not intended by the aider and
29 abettor, so long as it was a reasonably foreseeable consequence of the underlying criminal

1 conduct." *People v. Olguin, supra*, 31 Cal. App. 4th at 1380. Therefore, where a gang member
2 willfully engages in an act intended to aid a criminal act by another gang member, no specific
3 intent to commit or aid in the commission of the resulting crime need be shown, so long as the
4 resultant crime was a reasonably foreseeable consequence of the original conduct.

5 In *People v. Ortiz*, (1997) 57 Cal. App. 4th 480, the court relied almost entirely on expert
6 testimony to find that the requirements of Penal Code Section 186.22(b)(1) were satisfied. *Id.*, at
7 484, note 3. As discussed above, the court found that upon the expert's testimony this element
8 had been established to a point where the issue "cannot seriously be disputed." *Id.*

9 The issue of specific intent is subject to both expert testimony and aiding and abetting
10 theories. So long as the underlying act is willfully done (i.e. not unconscious or involuntary) and
11 satisfies the other element of subsection (b)(1) as being gang related, specific intent under this
12 element will generally be found.

13 **IV. 186.22 Testimony and Evidence**

14 Under the current state of the law surrounding Penal Code Section 186.22, the following
15 elements must be shown:

16 1. Criminal Street Gang

17 a. 3 or more members

18 i. May be proven through expert testimony.

19 ii. Police records, contact information and photographs, etc . . . are all relevant
20 to prove association.

21 b. Common name or common identifying sign or symbol

22 i. May be proven through expert testimony.

23 ii. "A single common name" and possibly a common color are sufficient.

24 c. Primary activity enumerated in 186.22(e)

25 i. May be proven through expert testimony, so long as the expert expressly
26 states what the crime is and that that crime is a "primary activity."

27 ii. The expert's foundation for this opinion may rest entirely on the charged
28 offenses.

29 2. Pattern of Criminal Gang Activity

- 1 a. Commission of two or more of the enumerated offenses in 186.22(e)
- 2 i. May be proven through expert testimony (provided any hearsay relied upon
- 3 by the expert be of sufficient specificity), percipient witness testimony and
- 4 certified records.
- 5 ii. The charged offense is usable as a predicate crime, and the charged
- 6 incident, if containing the commission of more than one enumerated
- 7 offense, is sufficient in itself to establish a pattern.
- 8 b. One offense occurring after 9/23/88.
- 9 c. Offenses occurring within three years of each other.

10 3. 186.22(a) Charge

- 11 a. Active membership
- 12 i. May be proven through expert testimony.
- 13 ii. Requires a showing the defendant's involvement is "more than nominal,
- 14 passive, inactive or merely technical" and/or that all or a substantial part of
- 15 the defendant's time is devoted to gang related activity.
- 16 b. Knowledge of criminal gang activity in defendant's gang
- 17 i. May be proven through expert testimony.
- 18 ii. Circumstantial evidence including rumor and "braggadocio" are relevant
- 19 and possibly sufficient in themselves.
- 20 c. Willful promotion, assistance or furtherance of felonious criminal conduct
- 21 i. May be proven through expert testimony.
- 22 ii. "Willful promotion" is identical under the law to aiding and abetting.
- 23 iii. "Felonious criminal conduct" is conduct amounting to the commission of a
- 24 felony.

25 4. 186.22(b)(1) Special Allegation

- 26 a. Felony conviction of underlying crime
- 27 b. Commission for benefit of, at the direction of or in association with a criminal
- 28 street gang.
- 29 i. May be proven through expert testimony.

- ii. Collateral effects of the crime including "respect" for the gang, revenge, and fear have all been found to constitute a benefit to a gang.
- iii. The "in association with" alternative may be shown solely through the presence of more than one gang member.
- c. Specific intent to promote, further, or assist in criminal conduct.
 - i. May be proven through expert testimony.
 - ii. Evidence of gang affiliation and involvement are, in themselves, evidence relevant to intent and motive.
 - iii. Subject to aider and abettor theory involving reasonably foreseeable consequences of intended acts.

5. Expert Witness Foundation

- a. Conversations with defendant's gang and/or defendant.
- b. Conversations with rival gang members.
- c. Personal investigation of gang crimes.
- d. Information from other officers, departments, and records, reports and other documents.
- e. Under *Valdez*, and Evidence Code Section 805, it is appropriate for the expert to testify directly to the ultimate issue.

V

911 TAPE IS ADMISSIBLE AS A SPONTANEOUS STATEMENT

The hearsay exception for declarations against interest has been recognized in case law since *Showalter v. Western Pacific RR* (1940) 16 Cal. 2d 460, and is now codified in the Rules of Evidence as section 1240. Case law has determined that there are two requirements which must be satisfied prior to admission of a hearsay statement under section 1240. The statement must purport to narrate, describe or explain an act condition or event perceived by the declarant and be made spontaneously while the declarant is under the stress of excitement caused by such perception. Confronting and cross examining the declarant is not necessary since:

"[t]he theory of the spontaneous statement exception to the hearsay rule is that since the statement is made spontaneously, while under the stress of excitement

1 and with no opportunity to contrive or reflect, it is particularly likely to be truthful.
2 As explained by Wigmore, **this type of out-of-court statement, because of its**
3 **"superior" trustworthiness, is "better than is likely to be obtained from the**
4 **same person upon the stand . . ."** (6 Wigmore, Evidence (Chadbourn ed. 1976)
5 § 1748, p. 199, italics added.) Unlike other hearsay exceptions in which the
6 unavailability of a witness makes it "necessary" to resort to hearsay as a weaker
7 substitute for live testimony (5 Wigmore, Evidence (Chadbourn ed. 1974) § 1420,
8 p. 251), the spontaneous statement exception involves a "necessity" of a different
9 sort: "[That] we cannot expect, again, or at this time, to get evidence of the same
10 value from the same or other sources" (id. at § 1421, p. 253, italics in original) and
11 "[the] extrajudicial assertion being better than is likely to be obtained from the
12 same person upon the stand, a necessity or expediency arises for resorting to it." (6
13 Wigmore, Evidence, op. cit. supra, § 1748, p. 199.) This is why unavailability of
14 the declarant as a witness need never be shown under this exception. (Ibid.; 6 Cal.
15 Law Revision Com. Rep. (1964) appen. pp. 465-466. See also *People v. Brust*
16 (1957) 47 Cal.2d 776, 785 [306 P.2d 480].)"

17 *People v. Hughey* (1987) 194 Cal.App.3d 1383, 1392. Emphasis added.

18 So reliable are these out of court declarations that they can be admitted without showing
19 that the declarant is competent to stand testify. In fact this exception has been used in dozens of
20 child molest and violent crime cases where the declarant was unable to testify due to
21 competence issues. (See . Evid. Code, § 701; *People v. Orduno*, 80 Cal.App.3d 738 [three-
22 year-old victim-declarant found not competent as preliminary hearing witness; her excited
23 utterance admitted at trial; *In re Damon H.*, 165 Cal.App.3d 471 [excited utterance by two- year-
24 nine-month-old victim admitted] Additionally they can support a conviction on their own and
25 do not require corroboration. *People v. Sully* (1991) 53 Cal.3d 1195, 1229-1230. In fact the
26 declarant does not even have to be identified. *People v. Provencio* (1989) 210 Cal.App.3d 290.
27 *Provencio* is especially important because in that case the statement of an unidentified child
28 saying "there goes Angel" was admitted to show the identity of a burglar. Clearly the rational
29 used in *Provencio* to admit and use such a statement to show identity indicates that spontaneous
statements are not subject to exclusion just because the content contains the identity of the
perpetrators.

The main inquiry to be made prior to admission of hearsay is whether or not it is reliable.
(*People v. Frierson*, supra.) In fact it has been held that, "the heart of the exception is the basic

1 trustworthiness of the declaration.” (*People v. Gordon*, supra at 1252, emphasis in original.)

2 This emphasis was also noted by the United States Supreme Court in *Ohio v. Roberts* (1980)
3 448 US 56, 65, 65 L.Ed.2d 597, 607:

4 The focus of the Court’s concern has been to insure that there ‘are indicia of
5 reliability which have been widely viewed as determinative of whether a statement
6 may be placed before a jury though there is no confrontation of the declarant,’
7 (citations omitted) and to ‘afford the trier of fact a satisfactory basis for evaluating
8 the truth of the prior statement.’ (Citations omitted.)

9 “The decision whether trustworthiness is present requires the court to apply to the
10 peculiar facts of the individual case a broad and deep acquaintance with the ways of human
11 beings actually conduct themselves in the circumstances material under the exception.” (*People*
12 *v. Frierson*, supra at p. 745 citing *People v. Gordon*, supra at 1251; See also: *Chambers v.*
13 *Mississippi*, supra at 311-312; and *People v. Cudjo*, supra at 607.

14 In the case at hand, the statements which the People seek to admit satisfy the
15 requirements of the code and case law. Laura Limon saw a vehicle being burglarized and
16 called 911 immediately. While she was on the phone a shot was fired by the suspects. She
17 described the acts of the suspects while the vent was occurring. Her brother in law who had
18 witnessed the incident only seconds earlier also described what he saw without the benefit of
19 reflection.

20 The information given to the 911 operator was clearly reliable and made while Limon
21 and Herrera were under the stress of the incident. Dispatch records confirm that officers arrived
22 within minutes of the call being placed and had both suspects in custody in a few minutes. A
23 casing was found in the parking lot which matched a gun carried by one of the suspects at the
24 time of his arrest. Based on all these factors the tape must be deemed admissible and introduced
25 into evidence.

26 VI

27 911 TAPE IS SELF AUTHENTICATING

28 Tape recordings of 911 calls are writings. (See Evid. Code, 140 and 250.) The
29 authenticity of any tape recordings can be established simply by testimony by one of the

1 participants in the conversation. (Evid. Code 1413; *People v. Bowie* (1977) 72 Cal.App.3d 143,
2 151; *People v. Dupree* (1957) 156 Cal.App.2d 60, 67; *People v. Finch* (1963) 216 Cal.App.2d
3 444, 453.)

4 This means of authentication, however, is by no means exclusive. (See Evid. Code 1410
5 et seq.)

6 There is no requirement that the operator of the tape recorder be called as a witness.
7 (Evid. Code 1413; *People v. Richardson* (1968) 258 Cal.App.2d 23, 30 [operator of camera not
8 necessary for admission of photographs]; 2 Jefferson Cal. Evidence Benchbook (2d ed. 1982)
9 30.3, pp. 1071-1072.)

10 A tape recording may also be authenticated by a person who is not an expert in
11 voice identification but is simply familiar with the voice of one of the participants on the tape.
12 (Evid. Code 1416; *United States v. Axselle* (10th Cir. 1979) 604 F.2d 1330, 1338; *United States*
13 *v. Watson* (10th Cir. 1979) 594 F.2d 1330, 1334.)

14 The authenticity of a tape recording may be established by the content of the tape itself.
15 (Evid. Code 1421; *People v. Fonville* (1973) 35 Cal.App.3d 693, 708-709 [matters unlikely to
16 be known by anyone other than purported speaker]; *People v. Estrada* (1979) 93 Cal.App.3d 76,
17 100.)

18 Additionally, because of a 911 tape is a writing prepared by a public employee at the
19 behest of a public entity, there is a presumption that the audio signature which is customarily
20 found at the beginning of the tape, or the end of the tape, or both, is genuine. (See Evid. Code
21 1453, 195, and 200.) Also, the dispatcher customarily begins each 911 phone conversation with
22 the audio signature, offering similar authentication. (Ibid.)

23 Accordingly, the authenticity of the 911 tape in the present case is established by several
24 different methods, any of which serves as proper authentication under law.

25 ///

26 ///

27 ///

28 ///

29 ///

CONCLUSION

Based on the foregoing Points and Authorities, the People respectfully request the foregoing In Limine Motions be granted.

Dated: 08-04-03

Respectfully Submitted,

BONNIE DUMANIS
District Attorney



SOPHIA ROACH
Deputy District Attorney

EXHIBIT E

06/03/08

CALIFORNIA DEPARTMENT OF CORRECTIONS
THIS IS THE ACCOUNT DISPLAY

ACCOUNT INFORMATION

ORIGINAL FORM

ACCOUNT NUMBER: V15561
 ACCOUNT NAME: RODRIGUEZ, JAVIER
 ACCOUNT TYPE: I
 CURRENT BALANCE: 51.55
 FIELD BALANCE: 0.00
 CREDIT BALANCE: 0.00
 AVAILABLE BALANCE: 51.55
 PRIVILEGE CODE: 1
 LAST DATE: 06/03/2008

DATE	FROM	AMOUNT	DESCRIPTION	CHECK NUM	COMPLANT	BALANCE
05/03/06	W/08	15.60	DONATION-VICTIM			15.60
05/01/06	FC01	15.55	UNAM-FAC I			15.55
05/01/06	W/08	40.06	INMATE-PAYROLL-			40.06
05/02/06	W/08	5.00	CORREY CHARGE			45.06
05/09/06	FC01	35.86	DONAM-FAC I			9.20
07/03/06	W/08	51.55	INMATE-PAYROLL-			51.55
06/03/08	I OF	3 PAGES				51.55

LIST ACCOUNT
FINANCIAL DISPLAY

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EXHIBIT F

F I L E D
Clerk of the Superior Court

AUG 10 2006

By: **LESLIE MCALLISTER**

SUPERIOR COURT FOR THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN DIEGO

In the Matter of the Application of

JAVIER RODRIGUEZ,

Petitioner.

) Case No.: HSC 10837; SCS 176087;
) Appellate Case No. D043198

) **ORDER DENYING PETITION FOR WRIT**
) **OF HABEAS CORPUS**

**AFTER REVIEWING THE PETITION FOR WRIT OF HABEAS CORPUS AND THE
COURT FILE IN THE ABOVE-REFERENCED MATTER, THE COURT FINDS AS
FOLLOWS:**

**Mr. JAVIER RODRIGUEZ ("Petitioner") is currently incarcerated with the California
Department of Corrections & Rehabilitation ("CDCR") at the California Men's Colony West,
located in San Luis Obispo, California. In Case No. SCS 176087, a jury convicted Petitioner of
burglary (Penal Code § 459), attempting to dissuade a witness from reporting a crime (Count 1;
Penal Code § 136.1(b)(1)), concealing a firearm in a vehicle while being an active participant of
a criminal street gang (Count 2; Penal Code § 12025(a)(1)), and carrying a loaded firearm while**

1 being an active participant of a criminal street gang (Count 3; Penal Code § 12031(a)(1))
2 Petitioner was also convicted of personally using a firearm during the dissuading of a witness
3 (Count 4; Penal Code § 12022.5(a)(1)). In a bifurcated proceeding, the court found that
4 Petitioner had a prior serious or violent felony conviction, or "strike," within the meaning of
5 Penal Code §§ 667(b)-(i) and 1170.12). Petitioner was sentenced to a total term of 14 years, 4
6 months in state prison.

7 Petitioner appealed his conviction to the Court of Appeal, 4th Dist., Div 1.; Case No
8 D043198. Petitioner's conviction was affirmed in an unpublished decision filed on April 6,
9 2005.

10 On July 20, 2006, Petitioner filed a petition for writ of habeas corpus ("Petition") with
11 this court. The Petition repeats arguments that were considered and rejected on appeal. Those
12 arguments include: (1) the court abused its discretion by failing to remove a juror, (2) the
13 evidence was insufficient to establish Petitioner attempted to dissuade a witness, (3) the evidence
14 was insufficient to establish Petitioner committed the offenses for the benefit or at the direction
15 of, or in associate with a criminal street gang for Counts 3 and 4, (4) there was insufficient
16 evidence that Petitioner was an active participant of a criminal street gang for Counts 3 and 4, (5)
17 Petitioner's Sixth Amendment rights to confrontation were violated through the admission of
18 certain gang expert testimony, (6) Petitioner's suffered prejudicial error through the admission of
19 Petitioner's prior residential burglary convictions, (7) the court erred by failing to give, sua
20 sponte, lesser included instructions on Counts 3 and 4, (8) the court violated Petitioner's Sixth
21 Amendment right to a jury trial by imposing consecutive sentence based upon judicial fact
22 finding, (9) the court abused its discretion by failing to dismiss the prior strike, and (10) the court
23 erred by giving conflicting jury instructions on the Penal Code § 186.22 gang enhancement.

24 //

1 In general, habeas corpus cannot serve as a second appeal, and matters that were raised
2 and rejected on appeal are not cognizable on state habeas corpus in the absence of special
3 circumstances. The "*Waltreus* rule" generally prohibits raising an issue in a postappeal habeas
4 corpus petition if that issue has been raised and rejected on direct appeal. (*In re Waltreus* (1965)
5 62 Cal. 2d 218; see also *In re Huffman* (1986) 42 Cal.3d 552, 554-55 and *In re Terry* (1971) 4
6 Cal.3d 911, 927.)

7 Case law has established four exceptions to the "*Waltreus* rule," which allow a petitioner
8 to raise the following issues in a postappeal petition: (1) A fundamental constitutional error, (2)
9 Lack of fundamental jurisdiction; (3) A pure question of law that demonstrates that the trial court
10 acted in excess of jurisdiction; or (4) A change in law affecting the petitioner. (*In re Harris*
11 (1993) 5 Cal. 4th 813, 829-841.) A claimed constitutional error must be clear and fundamental,
12 and strike at the heart of the trial process. The California Supreme Court noted limited this
13 exception to "rare situations." (*Id.* at 834.)

14 In the present case, the court finds that the ten aforementioned claims set forth in the
15 Petition were considered and rejected on appeal. The court furthermore finds that none of these
16 claims constitute the rare exception to the "*Waltreus* rule," which bars this court from
17 considering issues raised and rejected on appeal. The claims raised in the Petition, either
18 individually or collectively, fail to present fundamental constitutional errors that strike at the
19 heart of the trial process. For the reasons stated, the ten claims denied on appeal, and repeated in
20 this Petition, are summarily denied.

21 The Petition also asserts that the court imposed an excessive restitution fine. The "*Dixon*
22 rule" generally prohibits habeas corpus relief on issues that could have been raised on appeal.
23 (*In re Dixon* (1953) 41 Cal. 2d 756.) As a general rule, habeas corpus cannot serve as a
24 substitute for an appeal, and matters that "could have been, but were not, raised on a timely
25 appeal from a judgment of conviction" are not cognizable on habeas corpus in the absence of

1 special circumstances warranting departure from that rule. (*In re Clark* (1993) 5 Cal.4th 750,
2 765 [quoting *In re Dixon* (1953) 41 Cal.2d 756, 759]; *In re Walker* (1974) 10 Cal.3d 764, 773.)
3 Petitioner fails to explain why his complaint concerning restitution and fines was not brought on
4 appeal. Accordingly, this claim is also summarily denied.

5 Petitioner's complaint regarding an excessive restitution fine fares no better on its merits.
6 In the present case, the court imposed a restitution fine of \$10,000. This amount is the maximum
7 amount authorized pursuant to Penal Code § 1202.4(b). The court did not abuse its discretion by
8 imposing the maximum restitution fine in this case.

9 The court finds that the Petition fails to state a prima facie case for relief. For the reasons
10 stated, the Petition is denied.

11 Service of this ORDER is ordered on Petitioner.

12 IT IS SO ORDERED:

13 Dated: 8/9/06

14 
RAYMOND EDWARDS
JUDGE OF THE SUPERIOR COURT

15
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22
23 The foregoing instrument consisting
of 4 page(s) is a full, true
24 and correct copy of the original on
file in this office



25 Clerk of the San Diego Superior Court

Dated: 8-10-06
By: [Signature]

VERIFICATION

STATE OF CALIFORNIA,) On this day, LISTED COURT PLEADINGS WERE GIVEN
COUNTY OF SAN LUIS OBISPO) TO PRISON OFFICIAL FOR FILING/MAILING
(C.C.P. §446 & 2015.5; 28 U.S.C. §1746)

I, Javier Espinoza Rodriguez, declare under penalty of perjury that: I am the
Petitioner in the above-entitled action; I have read the foregoing documents
and know the contents thereof; and the same is true of my own knowledge except as to
matters stated therein upon information and belief, and as to those matters, I believe
they are true.

Executed this 29 day of Oct., 2006, at CMC-East State Prison,
P.O. Box 8101, San Luis Obispo, CA 93409-8101

Javier Rodriguez
Petitioner

PROOF OF SERVICE BY MAIL

(C.C.P. §1013(a) & 2015.5; 28 U.S.C. §1746)

I, Scott Duke, am a resident of CMC-East State Prison, in the
County of San Luis Obispo, State of California; I am over the age of eighteen (18) years, and
am not a party to the above-entitled action. My state prison address is:

P.O. Box 8101, San Luis Obispo, CA 93409-8101

On Oct. 29, 2006, I served the following documents:

Petition for Writ of Habeas Corpus: No Exhibits

on the party(s) herein by placing true copy(s) thereof, enclosed in sealed envelope(s),
with postage thereon fully paid, in the United States Mail, in a deposit box so provided
at CMC-East State Prison, P.O. Box 8101, San Luis Obispo, CA 93409, addressed as follows:

Attorney General
P.O. BOX 85266
110 WEST "A" STREET, SUITE 1100
SAN DIEGO, CA 92101

There is delivery service by United States Mail at the so addressed, and/or there
is regular communication by mail between the place of mailing and the place so addressed.
I declare under penalty of perjury that the foregoing is true and correct.

DATED: Oct. 29, 2006

Scott Duke
Witness

REBUTTAL TO COURT'S DENIAL

1 Within the[COURT'S DENIAL-attached as Exhibit F, supra], the Court recognizes
2 two-basic creations of case-law rules; otherwise known as, precedence; the
3 "Waltreus Rule," and the "Dixon Rule." These two creations of the "Evolution of
4 Law," are where the Honorable Superior Court of San Diego County bases it's
5 reasons for the[Denial].
6

7 The Petitioner submits that, even withstanding those creatures of the
8 "Evolution of Law," he has stated numerous clear and fundamental constitutional
9 errors. (Please see Petitioner's[APPLICATION FOR PETITION FOR WRIT OF HABEAS
10 CORPUS]-[PET., mandated will refer to the mandated form, pp. 1-6 & PET., Id. pp.
11 1-33, will refer to the attached part to same], as a whole. He has also
12 demonstrated-through articulation-excess of the court's jurisdiction[excessive
13 fines and restitution orders-PET., ISSUE XI, id at pp. 21-23], of which, can be
14 likened to an authorized sentence, that can be challenged any time,
15 notwithstanding an appeal or no appeal. (See People v. Castro[Cal.App. 5th Dist.
16 1994]30 Cal.Rptr.2d 188; People v. Wilson, 26 Cal.Rptr.2d 537; and In re
17 Clark[1995]5 Cal.4th 750.)

18 To support the above, Petitioner has alleged Ineffective Assistance of
19 Counsel during his direct appeal[PET., mandated form at p. 5-question #10]. (See
20 People v. Pope[1979]23 Cal.3d 412; Wiggins v. Smith[2003]123 S.Ct. 2527; and
21 Smith v. Robbins[2000]528 U.S. 259.) Furthermore, please see[PET., Id. at p.
22 1-INTRODUCTION-]: For all Issues allege[IAC]of counsel generally, of which
23 implicate appellate counsel also. The very reasons for his filing the petition
24 is to boot-strap all the Issues and Claims within his[PETITION FOR REVIEW]to
25 that, of[IAC]applied to all counsel and to federalize those Issues and Claims
26 before re-allying to our Honorable Supreme Court for exhaustion purposes, as
27 stated therein; in reserve in case this Honorable Court denies Petitioner's
28

1 Application of this Original Petition for Writ of Habeas Corpus. However, his
2 trial counsel did not research the issue of excessive fines and restitution
3 orders before or after the Probation Report Recommendation or the Court's actual
4 pronouncement of said orders. He did not challenge that issue during the court
5 proceedings nor post-trial. Therefore, it can be conclusive on the issue of
6 Ineffective Assistance of Counsel, for he failed/refused to investigate,
7 research and then to challenge the amount-whatsoever. Thus, trial counsel did
8 not use reasonable competent counsel, of which any other counsel should have
9 afforded those protections of his client's interest. (Please see[Pet., Id. at
10 pp. 21-23].) Where the above[IAC]is previously submitted by Petitioner.

11 As insofar as, the rest of the Issues are concerned, the Petitioner has
12 articulated his pleading around the applicable procedural bars by demonstrating
13 that, a "Miscarriage of Justice," has taken place, both in regards to procedural
14 innocence and actual innocence[not guilty of the gang enhancements]. (Hewitt v.
15 Helms[1983]59 U.S. 460; and Ford v. Wainwright[1983]447 U.S. 399.)

16
17
18
19 Dated: 12/12/08.

20
21 Scott Howard Duke
22 Researcher, composer, and
23 typer: Scott Duke

24
25
26
27
28
Javier Rodriguez
Petitioner, in pro per
Javier Rodriguez

EXHIBIT G

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FILED
Stephan M. Kelly, Clerk

MAR 08 2007

Court of Appeal Fourth District

In re JAVIER ESPINOZA RODRIGUEZ

D049739

on

(San Diego County
Super. Ct. No. SCS 176087)

Habeas Corpus.

THE COURT:

The petition for a writ of habeas corpus has been read and considered by Justices Benke, Huffman and Aaron. We take judicial notice of the direct appeal D043198.

A jury convicted Javier Espinoza Rodriguez of burglary, attempting to dissuade a witness from reporting a crime, having a concealed firearm in a vehicle while being an active participant of a criminal street gang and carrying a loaded firearm while being an active participant of a criminal street gang. The jury also found Rodriguez had personally used the firearm. The court found Rodriguez had one strike conviction and sentenced him to a total term of 14 years, 4 months in prison.

On appeal Rodriguez contended:

1. the court abused its discretion by failing to remove a juror on grounds of bias
2. the evidence was insufficient to establish he attempted to dissuade a witness
3. the evidence was insufficient to establish he committed the offenses for the benefit or at the direction of, or in association with any criminal street gang
4. there was insufficient evidence to prove he was an active participant of a criminal street gang regarding the weapons counts
5. his Sixth Amendment confrontation rights were violated by the admission of certain gang expert testimony
6. the court prejudicially erred admitting evidence of his prior residential burglary conviction
7. the court prejudicially erred by failing to give, sua sponte, lesser included offense instructions on the weapons counts

REBUTTAL TO THE APPELLATE COURT'S
[FOURTH APPELLATE DISTRICT, DIVISION ONE]

DENIAL

Within the [COURT'S DENIAL-separately bound Exhibit C], the court refused to adjudicate the ten original claims-even though he has boot-strapped his new claims of ineffective assistance of counsel-in which, to exhaust his claims of the violation of his Six Amendment; by not only his trial counsel but, also his appellate/supreme court counsel. [Please see Petitioner's [APPLICATION FOR PETITION FOR WRIT OF HABEAS CORPUS]-[Pet., mandated form, pp. 1-6 & Pet., pp. 1-33, will refer to the attached part of same].]

The main reason used within the [COURT'S DENIAL] are case created laws of California's Procedural Bars of: issues that were already included within Petitioner's Direct Appeal and issues that were not included. However, the petitioner has articulated those reasons of his acts and omissions by pleading around them, for trial counsel and appellate counsel failed/refused to include those issues, and failed/refused to present all constitutional violations, in which, to federalize those claims/issues for purpose of state exhaustion. Thus, those reasons for denial will be dissipated more and more as petitioner re-climbs the latter of the quest, "request for relief," during his legal adventures towards and up into the federal courts. Plus, since-as the petitioner has shown-those reasons for denial were and are contrary to and an unreasonable application of established federal law. [Strickland v. Washington [1984] 466 U.S. 668, 679, [80 L.Ed.2d 674, 638, 104 S.Ct. 2052]; and Cronic v. United States [1984] 466 U.S. 684 [80 L.Ed.2d 657, 104 S.Ct. 2039].]

Those reasons above and his intentions are articulated already in numerous places throughout Petitioner's Petition. [Please see EXPANSION PLUS FEDERALISM

1 OF OLD ISSUES FOR STATE EXHAUSTION AND ADDENDUM OF NEW ISSUE AND CLAIMS-at p. 1
2 of 33-attached to the mandated form; and also see REBUTTAL TO COURT'S
3 DENIAL-Superior courts.] And to add the [ADDENDUM OF NEW ISSUES AND CLAIMS,
4 ibid., pp. 21-33-discovered, investigated, researched, and composed,
5 subsequently to, his PETITION FOR REVIEW].

6 The Honorable Court of Appeals, Fourth Appellate District, Division One,
7 does not even mention Petitioner's [IAC]-claims. [COURT'S DENIAL, pp. 1-2.]
8 Although, one might determine that, the [IAC] was adjudicated when the court
9 denied [ISSUE XIII], for the cumulative errors had issues of [IAC] therein.
10 [Ibid., p. 1-last ¶-last sentence.] [Osumi v. Givrbino [C.D. Cal. 2006] 445 F.
11 Supp.2d 1152-passed on issues/claims of violations of constitutional dimension
12 even without comment is considered exhausted.]

13 To back-track to [ISSUE VIII]-The Imposition of Consecutive Sentences
14 based on Judicial Fact Finding is Violative of the Six Amendment-the state
15 court never mentions the effect of [Cunningham v. California [2007] 549 U.S.
16], has upon this issue. So, therefore, we can conclude that, this was and is,
17 contrary to, and an unreasonable application of the facts of Petitioner's Case
18 compared to those of Cunningham. [Cunningham v. California, supra, 549 U.S.
19 ; compared to People v. Black [2005] 35 Cal. 4th 1238, 1247, 113 P.3d 534,
20 538.]

21 This issue was actually-denied without prejudice by the Honorable
22 California Supreme Court pending any relief to which defendant might be
23 entitled upon the finality of People v. Black, supra, [2005] 35 Cal. 4th 1238,
24 1247, 113 P.3d 534, 538 regarding the effect of Blakely v. Washington [2004]
25 542 U.S. ___, 124 S.Ct. 2531, and United States v. Booker [2005] 543 U.S. ___,
26 125 S.Ct. 738, on California law-that, was within his Petition for Review.
27 [Please see Pet., Exhibit A-Order En Banc.]
28

1 Therefore, considering the above and incorporated by reference all
2 Petitioner's Court Records [e.g., R.T.'s, C.T.'s, Affidavits, ect.], petitioner
3 now comes after considerable exhaustion, request this Honorable Court to
4 consider now, the effect[s] of Cunningham upon said issue[s], so denied without
5 prejudice. Thus, petitioner further request that, these effect[s] or affect[s]
6 of Cunningham should be applicable to any issue[s]/claim[s] so presented within
7 his petition regardless of lack for said cite and it's authority granted
8 through the Honorable United States Supreme Court's Discretion and it's
9 bite-marks in case. Especially in regards to the California's Three-Strike Laws
10 use of facts separate or in conjunction with numerous uses of Petitioner's
11 Strike-Prior. [Please see Pet., pp. 28: 17-28, & 29: 1-10.]

12 The main focus should also be Petitioner's Convictions regarding
13 Gang-Enhancements under the [S.T.E.P. Act] and it's applicability to his
14 elongated prison sentence[s]/exposure[s]. [Pet., at ISSUES III, IV, V, X,
15 XII-especially], and XIII.]

16 As stated in those numerous [ISSUES] by petitioner, there was insufficient
17 evidence to sustain those Gang-Enhancements. The premise of his arguments stem
18 from a federal case on these exact issues that he has proffered. That case's
19 authority and interpretation are not recognized by the California Appellate
20 Courts.¹ [See People v. Hill [Agu. 2006] 142 Cal.App. 4th 770;-Cal.Rptr.3d
21 -disagreeing with Garcia; and People v. Romero [June 2006] 140 Cal.App. 4th 15;
22 Cal.Rptr.3d ____-disagreeing with Garcia.]

23 However, it is contended herein that, Petitioner's Case reflects Garcia in
24 perfection and is establishes substantial merit regarding violations of his
25 constitutional rights as numerously stated within his [Petition]. And although,
26 the Honorable California Appellate Courts failed/refused to grant relief to
27 defendants and/or petitioners, the United States Federal Courts do recognize
28

¹ Garcia v. Carey [2005-9th Cir.] 395 F.3d 1099.

1 the constitutional implications and therefore, grant relief based therein and
2 thereon. Considering Petitioner's submission on this subject to the Honorable
3 California Supreme Court, this is a question of first impression for
4 adjudication. Please grant review of this newly presented constitutional
5 question of first impression, and adjudicate accordingly.

6 For the Petitioner knows within his heart that he was not involved in gang
7 activities anymore or for the benefit of any gangs-whatsoever. [Please see
8 Pet., ISSUE XII, pp. 24-26, & ISSUE XIII, at p. 29: 11-14-girlfriends
9 testimony, now she is his wife and defendant's testimony generally.]

10 Petitioner's arguments regarding the application of Garcia Case Facts
11 compared to his are contained within his [Petition-generally]: However, such
12 convincing language is proffered here to convince this Honorable "Trier of
13 Facts," as follows:

14 "We review de novo the district court's order granting Garcia's petition
15 for writ of habeas corpus. Clark v. Murphy [9th Cir. 2003] 331 F.3d 1062, 1067.
16 A defendant alleging that the evidence was insufficient to support his
17 convictions can obtain relief only if, 'upon the record adduced at the trial[,]
18 no rational trier of fact could have found proof of guilt beyond a reasonable
19 doubt.' Jackson v. Virginia [1979] 443 U.S. 307, 324 [emphasis added]. It
20 appears to be an open question in this circuit whether the Antiterrorism and
21 Effective Death Penalty Act of 1996 ['AEDPA'], 28 U.S.C. § 2254[d], adds a
22 second level of deference to this standard, so that a federal habeas petitioner
23 may obtain relief only by demonstrating that the state court's adjudication on
24 the merits of the claim involved an unreasonable application of Jackson's 'no
25 rational trier of fact' standard. See Chein v. Shumsky, 373 F.3d 978,983 [9th
26 Cir. 2004][en banc]. Like our en banc court in Chein, we do not decide the
27 effect of AEDPA on Jackson because we reach the same result whether we review
28

1 directly under **Jackson** or whether we review more deferentially the state
2 court's application of **Jackson** under AEDPA's standard. See id." [Emphasis
3 added in bold and quotation marks added.]

4 Thus, Petitioner's Case and the facts therein, were adjudicated by the
5 state court's-so far-have been an unreasonable application and contrary to
6 established federal law.

7 The theory of specific intent, aiding & abetting, and the use of a
8 so-called gang-expert witness were mirrored [Garcia], compared and applied to
9 Petitioner's Case of Facts, plus the evidence that supports those facts. The
10 constitutional implications are identical also, and thus, deserve relief
11 based thereon. [Please see record as a whole, and additionally the arguments
12 based and compared thereon.]

13 In addition petitioner points and directs this Honorable Court's
14 attention to Osumi v. Givrbino [C.D. Ca. 2006] 445 F. Supp.2d 1152-1160:

15 For even though habeas corpus was denied, there are numerous
16 issues/claims that are contended and pertinent in everyone's cases. [I.e.,
17 IAC, allegations of counsel's disciplinary actions, cumulative error, and
18 faulty jury instruction given-interalia.] However, one must see the apparent
19 difference of the merits of Petitioner's Case Facts compared to Osumi.
20

21 Back-tracking even farther to [ISSUE I-PETITION FOR REVIEW, at pp. 8-11,
22 Exhibit A; and Pet., pp. 4-6], Juror #7, should have been excused for she was
23 unequivocally stated: "she was fearful for her and her family, due to the
24 allegations of gang affiliation of the defendant's." [R.T.A. 159:
25 1-4-referring to Reporter's Transcripts Augumented on Appeal.] This is
26 important to include at this point, for it intertwines with the
27 unconstitutionality of Petitioner's Gang-Enhancements that, are alike
28 barnacles stuck upon a ship's-bottom and need to be scrapped off. This

1 extraneous influence upon a juror has been ruled on-along time-ago by the
2 Honorable United State Supreme Court in Remmer v. United States [1954] 347
3 U.S. 227:

4 "Extraneous influences not only include juror contact with other
5 people, but also juror contact with evidence, and other extrinsic materials.
6 In the event that a juror is exposed to extraneous influences, the trial
7 court 'should determine the circumstances, the impact thereof upon the juror,
8 and whether or not it was prejudicial, in a hearing with all interested
9 parties permitted to participate.'" [Citing Remmer, supra, 347 U.S. at 230.]
10 So, this [ISSUE I] was adjudicated by the state courts in an unreasonable and
11 contrary to application to Remmer, a firmly established federal law; for the
12 prejudicial and the biased feelings of that [Juror #7] tainted the standard
13 of "beyond a reasonable doubt," that had to be proven by the prosecution, for
14 she assumed defendant must be guilty [even before trial], for he is a
15 gang-member and "I must find him guilty, to put him away, so that, he can not
16 hurt me or my family."

17
18 The petitioner submits that, additional records regarding his case that,
19 establish even more substantial material evidence of facts are contained
20 therein, and will be lodged with this Honorable Court, if necessary.

21 Petitioner humbly request relief; based upon his Application for Writ of
22 Habeas Corpus, the full record in this matter, the affidavits, and the within
23 information of this [REBUTTAL]; be granted. Thank you.

24
25
26 Submitted by,

27
28 Dated: JUNE 6, 2007.

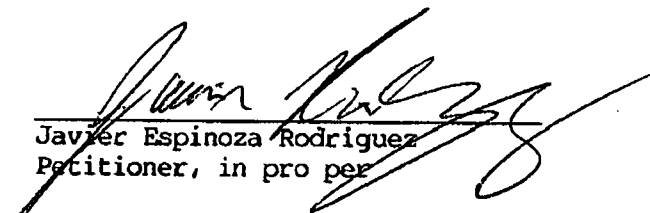

Javier Espinoza Rodriguez
Petitioner, in pro per

EXHIBIT H

**CALIFORNIA SUPREME COURT'S DENIAL: AND
ADDENDUM [#2]: GENERALITIES OF THE APPLICABILITIES OF CUNNINGHAM, OF WHICH
VIOLATE THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES
CONSTITUTION**

S153884

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JAVIER ESPINOZA RODRIGUEZ on Habeas Corpus

The petition for writ of habeas corpus is denied.

**SUPREME COURT
FILED**

DEC 12 2007

Frederick K. Ohlrich Clerk

Deputy

GEORGE

Chief Justice

1 VIOLATE THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

2
3 Under the United States Supreme Court opinion in Cunningham v California
4 [No 05-6551, Jan. 22, 2007] [549 U.S. ____] [2007 U.S. 1324], abrogating People v
5 black [2005] 35 Cal. 4th 1238, the sentence violated the Sixth Amendment jury
6 trial guarantee and the Fourteenth Amendment requirement of proof beyond a
7 reasonable doubt for aggravating factors used to support an upper term sentence.
8 As Cunningham held, the decision was a direct application of the bright-line
9 rule of Blakely v Washington [2004] 542 U.S. 296, and Apprendi v New Jersey
10 [2000] 530 U.S. 466, to California upper terms.

11 Based on settled California Supreme Court and federal constitutional
12 authority, this court should reduce the upper term sentence to midterm with no
13 remand. In the alternative, the judgment should be vacated and the cause
14 remanded.

15
16 Cunningham, is a straightforward application of Blakely v Washington [2004]
17 542 U.S. 296, and the bright-line rule of Apprendi v New Jersey, supra, [2000]
18 530 U.S. 466. Except for a prior conviction, any fact that increases the penalty
19 for a crime beyond the prescribed statutory maximum must be submitted to a jury
20 and proved beyond a reasonable doubt. [Cunningham, supra, 549 U.S. ____, at [2007
21 LEXIS 1324, pp. 35-36].] [Quoting Apprendi, at p. 490.]

22 The bright-line rule was explained in Apprendi with specific reference to
23 the Sixth and Fourteenth Amendments. "Under the due process clause of the
24 Fourteenth Amendment, and the notice and jury trial guarantees of the Sixth
25 Amendment and the fact [other than a prior conviction] that increases the
26 maximum penalty for a crime must be charged in an indictment [or information],
27 and submitted to a jury, and then proven beyond a reasonable doubt. " [Id., at
28 p. 476 [quoting Jones v United States [1999] 526 U.S. 227, 243, fn. 6].] As

1 Blakely recapitulated: This rule reflects two longstanding tenets of common-law
2 criminal jurisprudence: that the truth of every accusation against a defendant
3 should afterwards be confirmed by the unanimous suffrage of twelve of his equals
4 and neighbors, and that an accusation which lacks any particular fact which the
5 law makes essential to the punishment is no accusation within the requirements
6 of the common-law, and it is of no accusation in reason. [Blakeley, supra, 542
7 U.S. at pp.301-302 [citations omitted].] "[E]very fact which is legally
8 essential to the punishment must be charged in the indictment and proved to a
9 jury." [Id., at p. 302, fn.5 [citation omitted].] In Cunningham, the Supreme
10 Court held that the California Sentencing Rules require that the mid-term shall
11 be imposed unless circumstances in aggravation or mitigation are found, so an
12 upper-term cannot be imposed without extra facts beyond those found necessarily
13 by the jury's verdict. As a result, Cunningham held, the Blakeley prescribed
14 statutory maximum is the midterm-the maximum sentence a judge may impose solely
15 on the basis of the facts reflected in the jury verdict or admitted by the
16 defendant-so facts used to support a sentence above the midterm are subject to
17 the Sixth and Fourteenth Amendments under Apprendi and Blakely. [Cunningham, 549
18 U.S., at pp. ____ - ____ [2007 U.S LEXIS 1324, at pp. 26-27, 35-36, 40, fn. 14, &
19 44].] Cunningham held, that should be the end of the matter. [Id., at p.
20 [2007 U.S. LEXIS 1324, at p. 36] [quoting Blakeley, supra, 542 U.S. p. 313].]
21 But it then went on to analyze the California Supreme Court's assumptions in
22 Black, and found that each violated Apprendi's bright-line rule. [Cunningham,
23 supra, at p. ____ [2007 LEXIS 1324, at pp. 39-40].] And that, Black misunderstood
24 prior U.S. Supreme Court precedent in its erroneous belief that there was no
25 bright-line rule on the issue. [Cunningham, at p. ____ [2007 LEXIS 1324, at p.
26 40].] Accordingly, Cunningham held that the Sixth and Fourteenth Amendment
27 requirements of a jury and proof beyond a reasonable doubt for upper term
28

1 aggravating factors [other than prior conviction] apply directly to
2 California's Sentencing Laws, in exactly the same manner that they apply to the
3 Washington Sentencing Scheme which the U.S. Supreme Court invalidated in
4 Blakely, and to the mandatory Federal Guidelines invalidated in United States v
5 Booker [2005] 543 U.S. 220. [Cunningham, supra, 549 U.S. ____ [2007 U.S. LEXIS
6 1324, at pp. 11, 24, 35-37, & 39-44].]

7 Additionally, it is Petitioner's Contention that, Cunningham is a landmark
8 precedence that has yet to be defined to its two extremes-either generally or
9 specifically-for the wide, far-reaching ratifications have yet to ripple onto
10 its opposite shores of law. Petitioner believes that, more of California's
11 Sentencing Laws will fall when faced with the inter-meaning of Cunningham,
12 let-alone the other fifty-one states: Those laws are, but not limited to, The
13 Three-Strikes Law, The Second-Strike Law, and The Eighty-Five Percent [85%]
14 Law-reducing credit earning for-violent felony-offense(s) to fifteen percent
15 [15%].

16 First of all, within The Three-Strikes Law that, has within it a
17 [mandatory] sentencing Scheme identical to the Determinate Sentencing Law
18 [DSL-Penal Code § 1170 et seq.] [hereinafter all references to codes, statutes,
19 rules of court, ect. will be spelled-out, then they will be abbreviated within
20 Brackets, in bold]: See [P.C. §§ 667(b)-(i), & 1170.12 et seq.], but
21 specifically [667(e)(2)(A), (i), (ii), & (iii)]; of which gives three-levels of
22 punishment for a third-striker [mandatory that after computation of all three
23 choices, the longest term to apply], and this is decided by a judge, not a jury.

24 Secondly, a second-striker's sentence due to his or her prior strike, their
25 new term or terms can be elongated, enhanced, or/and aggravated by that prior
26 over and over again. First the new term [principle-term] [low, middle or high
27 term] will be doubled, any other subordinate-terms are to be added at one-third
28

1 of the middle-term [P.C. § 1170 et seq.], is doubled+each new felony conviction
2 will be applied the same, of which are all run consecutively [mandated] to any
3 and all other terms-on top of-the principle-term. Then of course, any applicable
4 enhancements, some of which, are provided by the same corresponding elements
5 [the very nature of the prior]-that prior strike; due to [e.g.] prison prior(s)
6 based thereon, are then run consecutively to the applicable count(s), a one-year
7 prison prior under [P.C. § 667.5(b)]; and a nickel prior under [P.C. § 667(a)]
8 could apply due to the same strike prior. And lets not forget that, all those
9 years combined consecutively-because of the use of one strike prior being used
10 over and over again-only twenty percent [20%] credit reduction will be earned,
11 and be applied on that, elongated, enhanced, or/and aggravated sentence. [See
12 P.C. §§ 667(b)-(i), & 1170.12 et seq.] As within the words of Cunningham:

13 "[N]otably, the Penal Code permits elevation of a sentence above the upper
14 term based on specifically statutory enhancements relating to the defendant's
15 criminal history or circumstances of the crime. See, e.g., Penal Code § 667 et
16 seq. [West Supp. 2006]; 12022 et seq. See also Black [italics omitted], 35 Cal.
17 4th, at 1257, 113 P. 3d, at 545. Unlike aggravating circumstances, statutory
18 enhancements must be charge in the indictment, and the underlying facts must be
19 proved to the jury beyond a reasonable doubt. Penal Code § 1170.1(e); Black, 35
20 Cal. 4th, at 1257, 113 P. 3d, at 545. A fact underlying an enhancement cannot be
21 used to impose an upper term sentence and, on top of that, an enhanced term.
22 Penal Code § 1170(b)."

23
24 Thus, the above is not just a worst-case scenario, it is part of thousands
25 of inmate's sentences today. Of course, it took about thirty-years [30]-years
26 for Cunningham to make a dent upon the Determinate Sentencing Law [DLS-P.C. §
27 1170 et seq.]. [See expansion below-on these contention(s) that, are applicable
28 to said petitioner-specifically.]

1 Thirdly, some of the above sentencing [mandated] schemes are taken, farther
2 or separately, can only earn fifteen percent [15%] reduction credit earning
3 ability. For the conviction of a-violent felonies-causes that count or even all
4 counts to be regulated to allow only the earning of fifteen percent [15%] credit
5 ability [P.C. §§ 667.5(c)(1)-(22), & 2933.1.]
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CLERK TRANSCRIPTS

0226

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

DATE: AUGUST 14, 2003 DEPT: FOURTEEN

REPORTER A: I. PERKINS

CSR #: 12727

PRESENT HON. ESTEBAN HERNANDEZ,
JUDGE

REPORTER B:

CLERK: J. L. RODRIGUEZ

BAILIFF: F. HINKLE

REPORTERS' ADDRESS:

P.O. Box 128

San Diego, CA 92112-4104

SCS 176087
DA BAL57601/02THE PEOPLE OF THE STATE
OF CALIFORNIA,
Plaintiff,
vs.

BY: DDA - SOPHIA ROACH

LEON, JOSE LUIS
&
RODRIGUEZ, JAVIER E.

BY: JERRY LEAHY

BY: BENJAMIN SANCHEZ

Defendants.

09:09 AM This is the time previously set for jury deliberations in the above-entitled cause, having been continued from August 13, 2003. All sworn jurors are present and commence deliberations.

11:28 AM Sworn bailiff delivers jury note #1 to the Court. Clerk notifies attorneys to report to court at 01:15 p.m.

01:33 PM Court is in session with DDA Sophia Roach is present on behalf of the People. Jerry Leahy is present on behalf of defendant Leon. Neither defendant is present. Jerry Leahy is appearing on behalf of Benjamin Sanchez and defendant Rodriguez. Jury note #1 reads as follows:

"ON CT. 3 - IS THE CHARGE OF CONCEALED WEAPON BY ITSELF? OR IS THE CHARGE CONTINGENT UPON BEING A GANG MEMBER? HENCE, IF NOT A GANG MEMBER THEN SHOULD WE THEN FIND HAVING A CONCEALED WEAPON AS A CRIME?"

Dated - 08/14/03

signed - juror #11

Court and counsel formulate the following response to jury note #1:

0227

SCS 176087 PEOPLE VS. LEON/RODRIGUEZ PAGE 2 OF 2 08/14/03

"THE COURT DIRECTS YOUR ATTENTION TO THE
INSTRUCTION CONTAINED IN CALJIC #16.460."

Signed – Judge Esteban Hernandez Dated – 08/14/03

01:46 PM Court's response to jury note #1 is delivered to the jury by the sworn
bailiff.

02:45 PM Sworn bailiff delivers jury note #2 to the Court. Jury note #2 reads as
follows:

"WE NEED COPIES OF THE TRANSCRIPTS FOR MARTINEZ &
RODRIGUEZ TESTIMONIES."

Court and counsel are notified of jury note #2 and concur with the court's
proposed response.

Court responds to jury note #2 as follows:

"YOU CAN HEAR A READBACK BY THE REPORTER, BUT WE
CANNOT PROVIDE TRANSCRIPTS."

03:05 PM Sworn bailiff delivers Court's response to jury note #2.

04:05 PM Sworn bailiff delivers Court's addendum response/inquiry to jury note #2.
Court's addendum to jury note #2 reads as follows:

"PLEASE INDICATE IF YOU WANT A READBACK BY THE
REPORTER."

Signed: Judge Esteban Hernandez Dated: 08/14/03

04:07 PM Sworn bailiff delivers jury note #2 with added writing from jury as
follows: "NOT TODAY!!" No signature or date added to note.

04:35 PM Sworn excuses the jury for the evening. Jury is to resume deliberations at
9:00 a.m. on 08/15/03. Both defendants remain in the custody of the
Sheriff with bail set at \$100,000 each.

-jlr-

SBS

SCSI76087 DA BAL57602

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

DATE 10-14-03 AT 09:00 M.

03118814

☐ CENTRAL ☐ NORTH ☐ EAST ☒ SOUTH
 PROB HEAR-SENTENCING

PRESENT: HORSTEBAN HERNANDEZ

JUDGE PRESIDING DEPARTMENT 014

0235

CLERK J.L. Rodriguez

REPORTER

M. Hirschorn

CSR#

4740

REPORTER'S ADDRESS: P.O. BOX 20128, SAN DIEGO, CA 92112-0128

THE PEOPLE OF THE STATE OF CALIFORNIA

VS.

DEPUTY DISTRICT ATTORNEY

RODRIGUEZ, JAVIER E

R - B. SANCHEZ

DEFENDANT

ATTORNEY FOR DEFENDANT (PD / APD / PCO) (RETAINED)

VIOLATION OF *PC459

*PC136.1(8)(1)

*PC12025(A)(1)

*PC12031(A)(1)

ENH(S)

INTERP.

OATH ON FILE / SWN.

PRIOR(S)

LANGUAGE

DEFENDANT ☒ PRESENT ☐ NOT PRESENT ☐ NOT PRODUCED

D.P.O. - K. Woodward

☐ DEFENDANT ADVISED OF RIGHTS AND ADMITS / DENIES A VIOLATION OF PROBATION☐ WAIVES HEARING.PROBATION IS / REMAINS: FORMALLY / SUMMARILY ☐ REVOKED ☐ REINST ☐ MODIFIED ☐ CONT ☐ ST&C ☐ TERMD. ☐ EXT. TO:☒ WAIVES ARRAIGNMENT. ☐ ARRAIGNED FOR JUDGMENT. ☐ IMPOSITION / EXECUTION OF SENTENCE IS SUSPENDED.☒ PROBATION IS: ☒ DENIED ☐ GRANTED YEARS (FORMAL/SUMMARY) TO EXPIRE☐ COMMITMENT TO SHERIFF FOR DAYS. STAYED TO / PNDG. SUCC. COMPL. OF PROB. ☐ PAROLE NOT TO BE GRANTED.☐ PERFORM HRS / DAYS PSP / VOL. WORK AT NONPROFIT ORG. SUBMIT PROOF TO PROBATION / COURT BY☐ 4TH AMENDMENT WAIVER☐ FORMAL PROB. CONVERTS TO SUMM. PROB.☐ FURTHER CONDITIONS ARE SET FORTH IN PROBATION ORDER. ☐ WORK FURLOUGH, REPORT:☐ DEFENDANT IS COMMITTED TO THE CALIFORNIA YOUTH AUTHORITY ☐ PER WI 1737☒ DEFENDANT IS COMMITTED TO THE DEPARTMENT OF CORRECTIONS ☐ PER PC 1170(d).☒ FOR LOWER / MIDDLE / UPPER / INDETERMINATE TERM OF 4 YEARS MONTHS TO LIFE☐ ON COUNT 2 CODE & NO. PC 136.1(8)(1) ☐ PRINCIPAL COUNT. ☐ STIPULATED SENTENCE.☒ DEFENDANT SENTENCED PER PC 667(b)-(1) 1170.12. ☒ NOTICE OF FIREARMS PROHIBITION GIVEN PER PC 12021.☒ NO VISITATION PER PC 1202.05. VICTIM IS UNDER 18 YRS. OF AGE. DA TO COMPLY WITH NOTICES.☒ DEFT. ADVISED REGARDING PAROLE / APPEAL RIGHTS. ☐ REGISTRATION PER PC 130 / HS 11590 / PC 457.1 / PC 186.30. ☐ TESTING PER PC 1202.1 HIV / PC 296 DNA.☒ DEFENDANT TO PAY: FINE OF \$10,000 PLUS PENALTY ASSESSMENT. ☐ \$20 COURT SECURITY FEE. ☐ PROBATION COSTS. ☐ BOOKING FEES.☒ REST. FINE(S) \$10,000 PER PC 1202.4(b). ☒ FORTHWITH PER PC 2085.5. ☒ \$10,000 PER PC 1202.45 SUSP. UNLESS PAROLE REVOKED.☒ RESTITUTION TO VICTIM(S) PER P.O.'S REPORT / REST. FUND PER PC 1202.4(f) OF \$250 / IN AN AMT. TO BE DETERMINED. ☐ JOINT & SEVERAL.☐ COURT-APPOINTED ATTORNEY FEES ORDERED IN THE AMOUNT OF \$☐ INCOME DEDUCTION ORDER OF \$ PER PAY PERIOD PER PC 1202.42 STAYED UNLESS DEFT. FAILS TO PAY VICTIM REST. NOTICE OF RIGHTS PROVIDED.☐ AT THE COMBINED RATE OF \$ PER MONTH TO START 60 DAYS AFTER RELEASE / ON☐ DEFENDANT IS REFERRED TO ☐ REVENUE & RECOVERY ☐ COURT COLLECTIONS TO SET UP AN ACCOUNT.☐ DEFENDANT IS TO REPORT TO PROBATION / REV. & REC / COURT COLLECTIONS FORTHWITH / WITHIN 72 HOURS OF RELEASE FROM CUSTODY.☒ DEFENDANT REMANDED TO CUSTODY OF SHERIFF ☐ WITHOUT BAIL. ☐ WITH BAIL SET AT \$☐ DEFENDANT TO REMAIN AT LIBERTY ☐ ON BOND POSTED \$ ☐ ON PROBATION. ☐ ON DEJ. ☐ ON OWN / SUPERVISED RECOGNIZANCE.☐ DEFENDANT ORDERED RELEASED FROM CUSTODY ☐ ON PROBATION. ☐ ON OWN / SUPERVISED RECOGNIZANCE. ☐ ON DEJ. ☐ THIS CASE ONLY.☐ DEFENDANT WAIVES STATUTORY TIME FOR PRONOUNCEMENT OF JUDGMENT.☐ DEFENDANT REFERRED FOR DIAGNOSTIC EVALUATION. ☐ PER PC 1203.03. ☐ PER WI 707.2.☐ CONTINUED TO / SET FOR OCT 20 2003 AT M. IN DEPT. ON MOTION

OF COURT / DA / DEFENDANT / PROBATION OFFICER. REASON:

☐ BENCH WARRANT TO ISSUE. BAIL SET AT \$☐ BENCH WARRANT ISSUED / ORDERED IS RECALLED / RESCINDED.☐ BAIL IS ☐ EXONERATED. ☐ FORFEITED. AMOUNT \$ BOND NO.

BOND COMPANY AGENT

☐ PROCEEDINGS SUSPENDED ☐ PER PC 1368, MENTAL COMPETENCY. (SEE BELOW FOR DATES OF EXAMINATION AND HEARING.)☐ PER WI 3051, ADDICTION OR DANGER OF ADDICTION. SERVICE OF PETITION:☐ PROBATION TO PREPARE SUPP. REPT. / SUBMIT POST-SENT REPT TO CDC PER PC 1203c. ☐ REPT. TO REG. OF VOTERS. ☐ DMV ABSTRACT. B.A.C.☒ CONCURRENT WITH CONSECUTIVE TO: As to: enhancement - PC 186.22(b)(1) -

5 years consec., PC 12022.5(A) - 4 years consec., PC 12022.5(A) -

1/3 mid term - 16 months consec., enh. PC 186.22 mid term

years - stayed per PC 654, enh. PC 186.22(b)(1) - mid term 4 years -

stayed per PC 654, enh. PC 12031(a)(1) - mid term 4 years - stayed

per PC 654, enh. PC 186.22(b)(1) - mid term -

3 years - stayed per PC 654. Total term 14 years, months

ESTEBAN HERNANDEZ JUDGE OF THE SUPERIOR COURT

CRIMINAL MINUTES, PRONOUNCEMENT OF JUDGEMENT

AS SC CR-28 (Rev. 9-03)

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO**

CLERK'S CERTIFICATE

I, the Clerk of the Superior Court,

DO CERTIFY:

- ☐ That the following Superior Court case file contains all the original documents filed in my office in the action on appeal in compliance with California Rules of Court, Rule 5.2.
- ☐ That the foregoing transcript was provided in part by the appellant/respondent, and these pages are numbered:
- ☐ Pursuant to California Rules of Court, Rule 11(a), the record on appeal is certified to be a full and true transcript of the record on appeal.
- ☐ That Notice of Completion has been mailed to counsel for respective parties and copy(ies) of the record made available in compliance with California Rules of Court, Rule 11(b).
- ☐ That the record on appeal was furnished wholly, or in part, in compliance with California Rules of Court, Rule 5(b)(d), and conforming with Rule 9; it is therefore transmitted to the reviewing court.
- ☒ Pursuant to California Rules of Court, Rules 35(c), 39 and 39.1, the foregoing record is hereby certified to be a full, true and correct transcript on appeal.

Witness my hand and the Seal of said Court.




Dated: November 19, 2003

CLERK OF THE SUPERIOR COURT

by Maria Talaban, Deputy
MARIA TALABAN

[NO, VALID WITHOUT COMPLETED PAGE TWO OF CR-290 ATTACHED]

CR-290

<input type="checkbox"/> SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO <input type="checkbox"/> MUNICIPAL BRANCH OR JUDICIAL DISTRICT SOUTH COUNTY					
PEOPLE OF THE STATE OF CALIFORNIA vs. DEFENDANT: JAVIER ESPINOZA RODRIGUEZ				DOB: 10-10-76	SCS176087 -A
AKA: CII#: 11432421				<input type="checkbox"/> NOT PRESENT	-B
BOOKING #: 03118814A				<input type="checkbox"/> AMENDED ABSTRACT	-C
COMMITMENT TO STATE PRISON ABSTRACT OF JUDGMENT				-D	
DATE OF HEARING 10-14-03		DEPT. NO. 14		JUDGE E. HERNANDEZ	
CLERK J.L. RODRIGUEZ		REPORTER M. HIRSCHORN		PROBATION NO. OR PROBATION OFFICER A-000788070	
COUNSEL FOR PEOPLE S. ROACH		COUNSEL FOR DEFENDANT B. SANCHEZ		<input type="checkbox"/> APPTD.	

1. Defendant was convicted of the commission of the following felonies:

- ☐ Additional counts are listed on attachment
 ____ (number of pages attached)

CNT.	CODE	SECTION NO.	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION (MO./DATE/YEAR)	CONVICTED BY			TERM (L, M, U)	CONCURRENT	CONSECUTIVE 1/3 VIOLENT	CONSECUTIVE 1/3 NON-VIOLENT	CONSECUTIVE FULL TERM	INCOMPLETE SENTENCE (see 1213.5)	664 STAY	PRINCIPAL OR CONSECUTIVE TIME IMPOSED	
						JURY	COURT	PLEA								YRS.	MOS.
2	PC	136.1(B)(1)	ATTEMPTING TO DISSUADE A WITNESS/REPORTING A CRIME	2003	08-15-03	X			M							4	0
1	PC	459**	BURGLARY	2003	08-15-03	X					X					1	4
3	PC	12025(A)(1)	HVG CNCEALED FIREARM/VEH	2003	08-15-03	X			M						X	4	0
4	PC	12031(A)(1)	CARRYING LOADED FIREARM	2003	08-15-03	X			M						X	4	0

2. ENHANCEMENTS charged and found to be true TIED TO SPECIFIC COUNTS (mainly in the PC 12022 series). List each count enhancement horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST enhancements stricken under PC 1385.

CNT.	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	TOTAL
2	PC186.22(B)(1)	5							5 0
2	PC12022.5	4							4 0

3. ENHANCEMENTS charged and found to be true FOR PRIOR CONVICTION OR PRISON TERMS (mainly in the PC 667 series). List all enhancements horizontally. Enter time imposed for each or "S" for stayed. DO NOT LIST enhancements stricken under PC 1385.

ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	ENHANCEMENT	Y/S	TOTAL

4. ☒ Defendant was sentenced pursuant to PC 667 (b)-(l) or PC 1170.12 (two-strikes).

5. INCOMPLETED SENTENCE(S) CONSECUTIVE

COUNTY	CASE NUMBER

6. TOTAL TIME ON ATTACHED PAGES:

7. ☐ Additional indeterminate term (see CR-292).

8. TOTAL TIME: 14 4

This form is prescribed under PC 1213.5 to satisfy the requirements of PC 1213 for determinate sentences. Attachments may be used but must be referred to in this document.

(Continued on reverse)

STATE OF CALIFORNIA vs.

JAVIER ESPINOZA RODRIGUEZ

SCS176087

-A

-B

-C

-D

9. FINANCIAL OBLIGATIONS (including any applicable penalty assessments):

- a. RESTITUTION FINE of: \$10,000 per PC 1202.4(b) forthwith per PC 2085.5.
- b. RESTITUTION FINE of: \$10,000 per PC 1202.45 suspended unless parole is revoked.
- c. RESTITUTION of: \$250.00 per PC 1202.4(f) to ☒ victim(s)* ☐ Restitution Fund
 (*List victim name(s) if known and amount breakdown in item 11, below.)
 (1) ☐ Amount to be determined.
 (2) ☐ Interest rate of: ___% (not to exceed 10% per PC 1202.4(f)(3)(F)).
- d. ☐ LAB FEE of: \$___ for counts: ___ per H&SC 11372.5(a).
- e. ☐ DRUG PROGRAM FEE of \$150 per H&SC 11372.7(a).
- f. ☐ FINE of \$___ per PC 1202.5.

10. TESTING

- a. ☐ AIDS pursuant to ☐ PC 1202.1 ☐ other (specify):
- b. ☐ DNA pursuant to ☐ PC 290.2 ☐ other (specify):

11. Other orders (specify):

COUNT ONE: PC186.22 MIDDLE TERM 3 YEARS STAYED PER PC654

COUNT THREE: PC186.22(B)(1) MIDDLE TERM 3 YEARS STAYED PER PC654

COUNT FOUR: PC186.22(B)(1) MIDDLE TERM 3 YEARS STAYED PER PC654

VICTIM: DONNA TUCKER

12. Execution of sentence imposed

- a. ☒ at initial sentencing hearing.
- b. ☐ at resentencing per decision on appeal.
- c. ☐ after revocation of probation.
- d. ☐ at resentencing per recall of commitment. (PC 1170(d).)
- e. ☐ other (specify):

13. CREDIT FOR TIME SERVED

CASE NUMBER	TOTAL CREDITS	ACTUAL	LOCAL CONDUCT
SCS176087 -A	179	156	23 <input type="checkbox"/> 4019 <input checked="" type="checkbox"/> 2933.1
-B			<input type="checkbox"/> 4019 <input type="checkbox"/> 2933.1
-C			<input type="checkbox"/> 4019 <input type="checkbox"/> 2933.1
-D			<input type="checkbox"/> 4019 <input type="checkbox"/> 2933.1
DATE SENTENCE PRONOUNCED: - -	SERVED TIME IN STATE INSTITUTION: <input type="checkbox"/> DMH <input type="checkbox"/> CDC <input type="checkbox"/> CRC		

14. The defendant is remanded to the custody of the sheriff ☒ forthwith ☐ after 48 hours excluding Saturdays, Sundays, and holidays.

To be delivered to ☐ the reception center designated by the director of the California Department of Corrections.
☐ other (specify): _____

CLERK OF THE COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE

T. GARCIA

DATE

12-08-03

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF,
VS.
JOSE LUIS LEON,
&
JAVIER RODRIGUEZ,
DEFENDANTS.

AUGUST 5, 2003
AUGUST 7, 2003

FOR THE PLAINTIFF: SOPHIA ROACH
DEPUTY DISTRICT ATTORNEY

FOR DEFENDANT LEON: JERRY LEAHY
ATTORNEY AT LAW

FOR DEFENDANT RODRIGUEZ: BENJAMIN SANCHEZ
ATTORNEY AT LAW

REPORTED BY: IRENE PERKINS, CSR NO. 12727
SAN DIEGO SUPERIOR COURT

CERTIFICATE OF REPORTER

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN DIEGO)

THE PEOPLE OF THE STATE OF CALIFORNIA

VS.

JAVIER RODRIGUEZ

CASE NO. SCS176087

AUGUST 5, 2003

AUGUST 7, 2003

PAGES 1 -- 174

I, IRENE PERKINS, CSR NO. 12727, A CERTIFIED SHORTHAND
REPORTER IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN
AND FOR THE COUNTY OF SAN DIEGO, HEREBY CERTIFY THAT I MADE A
SHORTHAND RECORD OF THE PROCEEDINGS HAD IN THE WITHIN CASE
AND THAT THE FOREGOING TRANSCRIPT IS A FULL, TRUE, AND
CORRECT TRANSCRIPTION OF THE PROCEEDINGS IN THIS CASE.

DATED THIS 7TH DAY OF JUNE, 2004.


IRENE PERKINS, CSR 12727

**COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT**

COPY

(California Rules of Court, Rules 9, 35, 39)

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff & Respondent

vs.

JAVIER RODRIGUEZ

Defendant & Appellant

FROM SAN DIEGO COUNTY

HON. ESTEBAN HERNANDEZ

JUDGE

NO. D043198

CLERK'S TRANSCRIPT

VOLUME 1 of 1

pgs 0 - 201

BILL LOCKYER, ATTY. GENERAL
STATE OF CALIFORNIA
110 WEST "A" STREET
SAN DIEGO, CA 92101
BY: , DEPUTY

Attorney for Plaintiff &
RESPONDENT

Attorney for Defendant &
APPELLANT

TO DCA:
TO ATTORNEY GENERAL:
TO ATTORNEY:

0003

CHARGES (cont'd)**UNIT 3 - HAVING CONCEALED FIREARM IN VEHICLE, OFFENDER ACTIVE PARTICIPANT OF CRIMINAL STREET GANG**

On or about May 11, 2003, JOSE LUIS LEON and JAVIER ESPINOZA RODRIGUEZ did unlawfully carry concealed within a vehicle which was under his/her control and direction a pistol, revolver and other firearm capable of being concealed upon the person, in violation of PENAL CODE SECTION 12025(a)(1).

And it is further alleged that the defendant is an active participant in a criminal street gang, within the meaning of PENAL CODE SECTION 12025(b)(3).

UNIT 4 - CARRYING A LOADED FIREARM ON ONE'S PERSON, ACTIVE PARTICIPANT OF CRIMINAL STREET GANG

On or about May 11, 2003, JOSE LUIS LEON and JAVIER ESPINOZA RODRIGUEZ did unlawfully carry a loaded firearm on his/her person and in a vehicle while in a public place and on a public street in an incorporated city and in a public place and on a public street in a prohibited area of unincorporated territory, in violation of PENAL CODE SECTION 12031(a)(1).

And it is further alleged that the defendant is an active participant in a criminal street gang, within the meaning of PENAL CODE SECTION 12031(a)(2)(C).

UNIT 5 - RESISTING AN OFFICER

On or about May 11, 2003, JOSE LUIS LEON did willfully and unlawfully resist, delay and obstruct a public officer, peace officer and emergency medical technician in the discharge of and the attempt to discharge a duty of his/her office and employment, in violation of PENAL CODE SECTION 148(a)(1).

PRIORS**JAVIER ESPINOZA RODRIGUEZ:****RIKE PRIOR(S)**

And it is further alleged pursuant to Penal Code sections 667(b) through (i), 1170.12, and 668 that the defendant, JAVIER ESPINOZA RODRIGUEZ, has suffered the following prior conviction(s) and juvenile adjudication(s), which are now serious or violent felonies under California law whether committed in California or elsewhere.

Charge	Date of Conviction	Court Number	Court	County	State
2459	04/22/1999	SCD142327	Superior Court	San Diego	CA

CHARGES (cont'd)**BUNT 3 - HAVING CONCEALED FIREARM IN VEHICLE, OFFENDER ACTIVE PARTICIPANT OF CRIMINAL STREET GANG**

On or about May 11, 2003, JOSE LUIS LEON and JAVIER ESPINOZA RODRIGUEZ did unlawfully carry concealed within a vehicle which was under his/her control and direction a pistol, revolver and other firearm capable of being concealed upon the person, in violation of PENAL CODE SECTION 12025(a)(1).

And it is further alleged that the defendant is an active participant in a criminal street gang, within the meaning of PENAL CODE SECTION 12025(b)(3).

BUNT 4 - CARRYING A LOADED FIREARM ON ONE'S PERSON, ACTIVE PARTICIPANT OF CRIMINAL STREET GANG

On or about May 11, 2003, JOSE LUIS LEON and JAVIER ESPINOZA RODRIGUEZ did unlawfully carry a loaded firearm on his/her person and in a vehicle while in a public place and on a public street in an incorporated city and in a public place and on a public street in a prohibited area of unincorporated territory, in violation of PENAL CODE SECTION 12031(a)(1).

And it is further alleged that the defendant is an active participant in a criminal street gang, within the meaning of PENAL CODE SECTION 12031(a)(2)(C).

BUNT 5 - RESISTING AN OFFICER

On or about May 11, 2003, JOSE LUIS LEON did willfully and unlawfully resist, delay and obstruct a public officer, peace officer and emergency medical technician in the discharge of and the attempt to discharge a duty of his/her office and employment, in violation of PENAL CODE SECTION 148(a)(1).

PRIORS

JAVIER ESPINOZA RODRIGUEZ:

RIKE PRIOR(S)

And it is further alleged pursuant to Penal Code sections 667(b) through (i), 1170.12, and 668 that the defendant, JAVIER ESPINOZA RODRIGUEZ, has suffered the following prior conviction(s) and juvenile adjudication(s), which are now serious or violent felonies under California law whether committed in California or elsewhere.

Charge	Date of Conviction	Court Number	Court	County	State
59	04/22/1999	SCD142327	Superior Court	San Diego	CA

SAN DIEGO

COUNTY PROBATION DEPARTMENT

0170

ADULT SERVICES

PROBATION OFFICER'S REPORT

THE PEOPLE OF THE STATE OF CALIFORNIA				COURT NO. SCS-176087		DEPT. & JUDGE SBSC DEPT. 14 HERNANDEZ, E.	
v.				DA FILE NO. BAL57602		ATTORNEY SANCHEZ, B RET	
RODRIGUEZ, JAVIER E				HEARING DATE/TIME 09/15/2003 09:00AM		PROB CASE NO. A-000788070	
RODRIGUEZ, JAVIER ESPINOZA				PROBATION OFFICER WOODWARD, K		PO TEL. NO. (619) 441-3483	
ESPINOSA, JAVIER RODRIGUEZ				TEL. NO. (619) 280-3925		BIRTHPLACE/CITIZENSHIP SAN DIEGO CA US	
ADDRESS 1211 ALTADENA AVE SAN DIEGO, CA 92115-5178							
BIRTH DATE 10/10/1976	AGE 26	RACE HIS/LAT/MEX	SEX MALE	HT 5'06"	WT 170	EYES BROWN	HAIR BLACK
DRIVER'S LIC. NO. CAB4475839		INS. NO.		OTHER ID DATA TT RIGHT ARM "SIDRO", 3 DOTS LEFT HAND ON CHEST CLOWN AND EVELIA			
DATE OFFENSE COMMITTED 05/11/2003		DATE CONVICTED 08/15/2003		HOW GUILTY BY JURY		CUSTODY STATUS CUSTODY	
INVESTIGATING ARRESTING AGENCY CHULA VISTA POLICE DEPARTMENT		DATE INFO FILED 06/09/2003		SDSO SYSTEM NO. 94188 014154			
NO. 432421		FBI NO. 485416DB0		ARREST REPORT NO. 0308732		SDSO BOOKING NO. 03118814A	

CONVICTED OF:

COUNT 01	PC459:SECOND DEGREE	BURGLARY
ALLEGATION	PC186.22(b)(1)	CRIME COMMITTED TO BENEFIT CRIMINAL
COUNT 02	PC136.1(b)(1)	CONDUCT OF STREET GANG
ALLEGATION	PC186.22(b)(1)	PREVENT/DISSUADE WITNESS/VICTIM FROM
ALLEGATION	PC12022.5(a)(1)	REPORTING A CRIME
COUNT 03	PC12025(b)(3)	PERSONAL USE OF A FIREARM
ALLEGATION	PC186.22(b)(1)	HAVING CONCEALED FIREARM IN VEHICLE
COUNT 04	PC12031(a)(1)	CARRY LOADED FIREARM IN PUBLIC PLACE
ALLEGATION	PC186.22(b)(1)	
FOR	PC667(b)-(i)/668	1ST STRIKE PRIOR

PLEA AGREEMENT:

Guilty by Jury.

RECOMMENDATION: State Prison

0171

RIGUEZ, JAVIER E
176087DEFENDANT(S):

Leon, Jose Luis: Found Guilty by Jury of same charges and is scheduled for Probation Hearing and Sentencing on 09/15/03 at SBSC-14 at 9:00 am.

RELATED COURT DATA:

None.

THE OFFENSE:SOURCES OF INFORMATION for this section

Chula Vista Police reports.

In that the defendant was found guilty by a jury, additional information may have been provided to the Court, but not the undersigned officer. The following synopsis of the offense was obtained from provided police reports.

On 05/11/2003, at approximately 2:00 am, Chula Vista Police were dispatched to a vehicle burglary in process. The witness reported that two male suspects were breaking into a Volkswagen Jetta in an apartment complex parking lot. It was also reported that when the suspects were told that the police were going to be called, a handgun was fired into the air. (As to Count 2) The two suspects then got into a dark colored SUV and left the scene.

As the first officer arrived on the scene, a green Ford Explorer was leaving the parking lot with its headlights turned off. The officer followed the vehicle until additional vehicles arrived, and then a traffic stop was initiated. The Ford Explorer pulled over, and as the officer exited his vehicle, co-defendant Jose Leon, exited from the vehicle's passenger side and began running away from the vehicle. Initially, he did not follow officers commands to stop. A short distance later he stopped and was taken into custody.

While being arrested, Leon admitted to having a gun. A loaded .22 caliber luger handgun was found in his waistband. (As to Counts 3 and 4) Also, 13 rounds of .22 caliber ammunition was discovered in his pockets.

Leon stated that he had just purchased the gun and did not have a permit. A records check on the gun's serial number was conducted with negative findings.

It was also noted that there was an odor of an alcoholic beverage coming from Leon.

the driver of the vehicle, the defendant, Javier Rodriguez was removed from the vehicle at gunpoint. He was non-compliant with the directives of the officers, and was physically taken to the ground. In that Leon had been in possession of a gun, and Rodriguez was non-compliant and intoxicated, he was shot with a taser gun. Rodriguez was finally able to be detained and handcuffed. After his arrest, he continued to be physically and verbally non-compliant. A field sobriety test was conducted with negative results.

The vandalized vehicle, a white Jetta, had both its driver and passenger side windows broken. The automatic gear shift was also broken. The glove compartment was open and there was a brick lying on the front passenger floorboard. Near the vehicle, a crowbar and a .22 caliber casing was found on the ground. The victim, Donna Tucker, reported that her car manual, her work identification card and her gas card were missing. She thought that there may have been additional items taken from the vehicle.

The victim was driven to the defendants vehicle, and she was able to identify her car manual, an ID card, a gas card, a mini-headset telephone, and a small clock. The gas card was released to Tucker, while the other items were taken as evidence. (As to Count 1)

Both defendants were positively identified by witnesses. Leon was identified as the individual who broke into the vehicle, and Rodriguez was identified as the individual who shot the handgun.

After being Mirandized, both defendants refused to give a statement and were transported and booked into County Jail.

VICTIMS:

RESTITUTION: \$250.00, to be paid jointly and severally with co-defendant Jose Leon.

VICTIM NOTIFIED OF P&S HEARING: Yes

INTENDS TO APPEAR: No

SOURCES OF INFORMATION for this section

See below.

A victim letter was mailed to DONNA TUCKER informing her of her rights per California law and requesting any information regarding any losses suffered as result of the instant matter.

Ms. Tucker reported that her vehicle was covered by insurance and the only restitution that she is seeking is \$250 for her deductible. She did not wish to make any additional statements.

176087

0173

DEFENDANT'S STATEMENT:SOURCES OF INFORMATION for this section

Interview with the defendant on 09/04/03 at the South Bay Detention Facility.

The defendant did not provide a written statement. He stated that on the night of the instant matter, he and Leon had gotten together. He explained that he had known Leon's older brother, who is currently in State Prison. They began drinking and each took approximately 5 "rochas." He did not have any recollection of how they ended up at the vehicle, and added that he had no plan or intent to burglarize the vehicle. However, he stated that his actions were "old behavior." When questioned about the gun, he stated that he had it in the vehicle for a long time, hidden in the spare tire. He explained that he fired the gun into the air "to show off," not to hurt anybody. Regarding his arrest, he stated that he was under the influence and was "slowed down" from the rochas. He explained that it was hard for him to follow the officers instructions and passed out numerous times during his arrest. He does not recall a sobriety test being conducted on him.

Over the past couple of years, the defendant reported that he has been "trying to do things right." He moved away from his neighborhood and has been supporting his wife and children. He described himself as a productive member of society.

He did admit to a drug and alcohol problem. He stated that while in custody, he has admitted to this addiction and realizes that he needs help. He has been attending Narcotics Anonymous, Alcoholics Anonymous, and Substance Abuse Classes while in custody.

Additionally, he has attended classes to receive his high school diploma, an HIV class, and parenting class. He has also requested information regarding the Delancey Street Treatment program in Los Angeles, which is a 1-year program for substance abuse and job training. In the future, he hopes to become a certified counselor, working with youth involved with gangs and drug abuse.

The defendant takes full responsibility for his actions, and although he is aware that a prison commit is likely, he hopes that the Judge will consider giving him another opportunity on Probation. If granted Probation, he will abide by its conditions.

CRIMINAL HISTORY:

SOURCES OF INFORMATION for this section

FBI and Local Computer Clearances.

DATE	AGENCY	CHARGE	DISPOSITION
07/09/1996	CVPD	VC23152(b) Driving Under the Influence	S104534: 05/14/96; misd, pg, 3 yrs crt prob. 07/19/96; revk, wi. 12/30/96; revk, reins. 03/13/97; revk, wi. 04/04/97; revk, reins 06/03/97; revk. 07/01/97; remanded into custody 120 dys. 04/18/01; PC1203.4 petition granted.
05/20/1997	SDPD	Cnt 1 VC10851(a) Taking Vehicle w/out Owners Consent, Cnt 2 PC496 Buying Stolen Property, Cnt 3 PC466 Posses Burglary Tools.	SF-115773: 07/01/97; fel, pg cnt 1 3 yrs f prob. 01/05/98; revk. 01/26/99 revk, reins. 03/03/99; revk. 06/08/99; revk, reins. 04/16/01; PC1203.4 Petition granted.
The defendant was arrested driving a stolen vehicle. At the time of his arrest, he was in possession of a screwdriver, a multi-tool, and several keys. He denied knowledge that the vehicle was stolen, reporting that he had borrowed it from a friend.			
02/18/1998	CVPD	VC14601.2 Driving on Suspended License after DUI Conviction.	S134726: 02/09/99; fta for arraign. bwi. 06/04/99; png. 07/06/99; pg, 3 yrs crt prob.

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11/1999 SDPD

Cnt 1 PC459
Burglary Cnt 2
PC136.1
Preventing or
Dissuading From
Attending or
Giving Testimony
Cnt 3 Terrorist
Threats

SCD-142327: 02/03/99;
fel, png. 04/22/99; cop.
06/08/99; pg cnt 1 3 yrs
f prob, \$250 fine, \$324
restit, 365 dys jl.

The defendant, after being asked to leave the victim's residence, was observed by the victim in her garage taking a tire and a rim. She subsequently discovered that a total of four tires, four rims, a cell phone, and pager were missing. The defendant was identified by the victim and arrested by the police. The victim also reported receiving threatening telephone calls from the defendant and his friends. Upon his arrest, the defendant denied taking the items or making threatening calls to the victim. None of the property was ever recovered.

01/01/2000 SDPD

VC14601.5
Driving While
Privileges
Suspended for
Specific BAL

S146248: 02/03/00; png,
misd. 02/24/00; cop, 3
yrs crt prob, fine.

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/2003 CVPD

COUNT 01
PC459:SECOND
DEGREE
BURGLARY
ALLEGATION
PC186.22(b)(1)
CRIME COMMITTED
TO BENEFIT
CRIMINAL
CONDUCT OF
STREET GANG
COUNT 02
PC136.1(b)(1)
PREVENT/DISSUADE
WITNESS/VICTIM
FROM
REPORTING A
CRIME
ALLEGATION
PC186.22(b)(1)
ALLEGATION
PC12022.5(a)(1)
COUNT 03
PC12025(b)(3)
HAVING CONCEALED
FIREARM IN
VEHICLE
ALLEGATION
PC186.22(b)(1)
COUNT 04
PC12031(a)(1)
CARRY LOADED
FIREARM IN
PUBLIC PLACE
ALLEGATION
PC136.22(b)(1)
PRIOR
PC667(b)-(i)/668
1ST STRIKE PRIOR

SCS-176087: GUILTY BY
JURY ALL FOUR COUNTS,
AND ALLEGATIONS PER
PC186.22(b)(1). INSTANT
MATTER.

PROBATION AND PAROLE:

SOURCES OF INFORMATION for this section

Local Computer Clearances and Probation records.

The defendant received his first misdemeanor and grant of Court probation in 1996 in case S104534 for Driving Under the Influence. This grant of Probation was revoked numerous times and was finally revoked with the defendant being remanded into custody for 120 days.

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also received his first felony conviction in case SF-115773. During grant he was again non-compliant and his probation revoked on numerous violations for failure to report, failure to test and possession of gang paraphernalia. He also failed to remain law-abiding and received a second misdemeanor conviction in case S134726 for Driving on a Suspended license. A new felony case SCD-142327 for Burglary.

After serving 365 days in custody in case SCD-142327, although he initially had problems, as time went on, he appeared to adjust to Probation with no violations. However, he did receive another misdemeanor conviction for Driving on a Suspended License. His grant was allowed to expire, with him remaining in compliance, on 06/07/2002.

Although in the past, the defendant appeared to have had difficulties adjusting to Probation, during his most recent grant of Probation his grant ended successfully.

PERSONAL DATA

The following information was offered by the defendant. Unless noted otherwise it has not been verified.

Birth Place and Areas of Residence:

The defendant was born in San Diego and has resided here his entire life.

Current Living Situation:

At the time of his arrest, he was living with his wife and their two children.

Family Relationships:

His parents are married and live in San Ysidro. He has 5 brothers and 3 sisters. Although he stated he is close to his mother and siblings, he needs to make "amends" with his father. According to him, his father was emotionally and physically abusive while he was growing up.

Marital Status and Dependents:

He married his girlfriend of four years, Gloria, while he was in custody. He states that she is very supportive of him. They have two sons, ages 3 and 6 months.

Family Criminal History:

He stated that three of his brothers have been involved in gang activity.

Acquaintances:

He spends his time with his wife and children.

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Social Activities:

enjoys sports.

Education:

defendant attended Southwest High School, however dropped out after the 11th grade. He then attended continuation high school, but eventually received his GED through the Job Corp. While in custody, he has been taking classes in order to receive his high school diploma.

Military Service:

none.

Employment History:

At the time of his arrest, he was employed as a concrete finisher for a local union where he has been employed for approximately 1 1/2 years. In the past, he has been employed as a forklift operator, and doing warehouse work. When he was younger he worked for fast food restaurants.

Upon his release from custody, he will be able to return to his job.

Financial Information:

He stated that he had been "doing good." However, since his arrest, his credit card bills have gone unpaid and wife is receiving AFDC.

Psychological and Medical Problems:

Denies.

Substance Abuse and Treatment History:

At the age of 11, he first tried beer. By junior high his drinking had increased and he considered himself a "heavy" drinker. He admits to regular use of alcohol and believes that he has a drinking problem. At 11, he also began smoking marijuana everyday. He continued using on and off, however, has not used since he was last in custody. He also began experimenting with cocaine and methamphetamine at that age. He stated that he only used cocaine a couple of times, however, admits to currently using methamphetamine "on the weekends," last using the night of the instant matter. He has also use "rochas" on several occasions, including the night of his arrest. As a juvenile, he experimented with mushrooms, PCP and acid.

While he has been in custody, he has attended substance abuse classes, Narcotics Anonymous, and Alcoholics Anonymous. He stated that he has become aware that he has a problem with alcohol and drugs, and is ready to address the issue.

Affiliation:

has been involved in the "Sidro" gang since he was 11, however stated he has not affiliated with them recently. He stated he wants to leave life behind. He also stated that he would like to have his gang tools removed.

CalGangs, the defendant is a documented gang member, who self-reported affiliation to SDPD in 1991. His moniker is "Casco" and also is know "Javi."

Migration Status:Future Plans:

five years, he hopes to be spending time with his family, having money, saving money for a house, and hopes to be volunteering his time with youth involved in gangs and drugs.

COLLATERAL INFORMATION:SOURCES OF INFORMATION for this section

see below.

In efforts to gather any additional information that may have come to light during the trial, DDA S. Roach and Defense Attorney B. Sanchez were contacted and messages were left.

Attorney Sanchez stated that this was a very tough case. He believes that the defendant is no longer a gang member, and has made substantial positive changes in his life, moving from his neighborhood, working and supporting his family. However, the defendant has a drug problem, which eventually led to the instant offense. Mr. Sanchez also added that he believes that since the instant matter the defendant has "seen the light."

In that it may not be clear what "rochas" are, the undersigned located information which identified "rochas" as a street name for Rohypnol, a sedative-hypnotic drug.

SENTENCING DATA: AS TO ALL COUNTSPossible Circumstances in Mitigation:

Rule 4.423(a)(4): Although not amounting to a defense, at the time of the instant matter, the defendant reported that he had been drinking and had taken 5 "rochas."

Rule 4.423(b)(6): The defendant's performance on his last grant of Formal probation was satisfactory and was allowed to expire successfully.

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Possible Circumstances in Aggravation:

Rule 4.421(b) (2): The defendant's prior convictions are numerous in that he has three prior misdemeanors and 2 prior felonies, one included a similar act in that the defendant stole items from the victim and then he and his friends would call and threaten her.

Rule 4.408(a): At the time of his arrest, the defendant was non-compliant and a taser gun needed to be used to detain him.

Possible Circumstances in Mitigation and Aggravation: As to the PC186.22(b) (1) allegation in Counts 1, 3, and 4.

None noted.

Possible Circumstances in Mitigation and Aggravation: As to the PC12022.5(a) (1) allegation in Count 2.

None noted.

Prison Term Analysis:

The sentencing options available for Count 1 PC459, Count 2 PC136.1(b) (1), Count 3 PC12025(b) (3), and Count 4 PC12031(a) (1) are 16 months, 2 or 3 years. In that the aggravating and mitigating factors appear balanced, the recommendation would be for the middle term in each case.

The allegation per PC186.22(b) (1) carries an additional 1, 2, or 3 years consecutive term for each felony which has been committed, at the Court's discretion. In that no mitigants or aggravants were noted, the recommendation would be for the middle term of 2 years. However, in that Count 2 PC136.1(b) (1) is considered a violent felony, the allegation as to that count is 10 years consecutive per PC186.22(b) (1) (C).

The allegation per PC12022.5(a) (1) carries an additional and consecutive term of 3, 4, or 10 years. In that no aggravating or mitigating factors were noted, the presumptive middle term of 4 years is recommended.

In regards to concurrent vs. consecutive sentencing, consecutive sentencing appears appropriate in Counts 1 and 2 per Rule 4.425(a) (1), that the crime and objectives were predominately independent of each other. Additionally that Count 3 and 4 be stayed per PC654 in that it represents the same course of conduct as in the PC12022.5(a) (1) allegation. Furthermore, that the PC186.22(b) (1) allegations in Counts 1, 3, and 4 also be stayed per PC654 in that they represent the same course of conduct as the allegation in Count 2.

Additionally, the Strike prior per PC667(b) - (i) indicates that the given term be doubled per PC667(e) (1).

Count 2 has been selected as the primary term in that it carries the most custody time.

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EVALUATION:Probation Eligibility:

Rule 4.413(b): The defendant is absolutely ineligible for Probation pursuant to PC667(b)-(i). Additionally, per PC1203.06(a)(1)(M), this allegation makes the defendant absolutely ineligible for Probation. Due to the ineligibility, circumstances supporting or denying a grant of probation will not be addressed.

Discussion:

Appearing before the Court today is 26-year-old Javier Rodriguez, having been found guilty by a jury of PC459 Burglary: Second Degree, PC136.1(b)(1) Prevent/Dissuade Witness/Victim from Reporting a Crime, PC12025(a)(3) Having Concealed Weapon in Vehicle, PC12031(a)(1) Carry Loaded Firearm in Public Place, PC186.22(b)(1) Crime for the Benefit of a Street Gang allegation in each count, and a PC12022.5(a)(1) allegation in Count 2. In this case, the defendant and co-defendant Leon were observed burglarizing a vehicle. When witnesses informed them that they were going to call the police, the defendant fired a handgun into the air. They drove away from the scene, however, were pulled over by police. The defendant was non-cooperative during the arrest and a taser gun needed to be used. In that he exhibited signs of being under the influence, a sobriety test was conducted with negative results. The co-defendant was found to have a loaded .22 caliber handgun in his waistband. Additionally, property belonging to the victim was located in their vehicle. After declining to give a statement, he was transported and booked into County Jail.

The victim, Donna Tucker is requesting \$250 in restitution for her insurance deductible. She did not wish to make any additional statements. It is being requested that restitution be jointly and severally paid by the defendants in the amount of \$125 each.

Regarding to the instant matter, the defendant stated he had no intentions of burglarizing the vehicle, or harming anyone with the gun. Although the defendant reported that he was under the influence of alcohol and "rochas," at the time of the instant matter, he takes full responsibility for his actions. He described these actions as "old behavior." Furthermore, although the defendant is documented in Cal Gangs, he contends that he has changed his life by moving from his neighborhood and not affiliating with his friends anymore. Additionally, he stated that he now realizes that he has substance abuse issues and hopes to address them.

In light of the proven "strike" prior and pursuant to PC1203.06(a)(1)(M), the defendant is absolutely ineligible for Probation..

Considering all the facts provided in this case, the undersigned respectfully submits the following recommendation for the Court's approval.

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CUSTODY DATA:

<u>Date Confined</u>	<u>Date Released</u>	<u>Place</u>	<u>Custody Days</u>
05/11/2003	09/15/2003 (In custody)	CJ	128
		PC2933.1 credits	<u>19</u>
		TOTAL CTS	147

RECOMMENDATION:

That probation be denied and the defendant be committed to the Department of Corrections for the term of 19 years 4 months with credit for time served of 128 actual days and 19 days 2933.1 PC credits, a total of 147 days credit; that the defendant pay a restitution fine pursuant to 1202.4(b) PC in the amount of \$10,000 to be paid forthwith or as provided in 2085.5 PC, that restitution in the amount of \$250.00 be paid jointly and severally with the co-defendant Jose Leon to victim Deborah Tucker ; further, that the defendant pay an additional restitution fine pursuant to 1202.45 PC in the amount of \$10,000 to be suspended and remain so unless defendant's parole is revoked.

Term Recommendation Breakdown by Count is as Follows:

<u>Crime</u>	<u>Suggested Base Term</u>	<u>Recommended Term</u>	<u>Recommended Stay</u>
Count 2 PC136.1(b)(1) Per PC667(b)-(i))	mid - 4 years	4 years	0
Allegation PC186.22(b)(1)	10 years (consecutive)	10 years	0
Allegation PC12022.5(a)(1)	mid- 4 years (consecutive)	4 years	0
Count 1 PC459:Second Degree Per PC667(b)-(i))	1/3 mid - 16 months (consecutive)	16 months	0
Allegation 186.22(b)(1)	mid - 2 years	0	2 years stayed per 654
Count 3 PC12025(b)(3) Per PC667(b)-(i))	mid - 4 years	0	4 years stayed per 654
Allegation PC186.22(b)(1)	mid - 2 years	0	2 years stayed per 654
Count 4 PC12031(a)(1) Per PC667(b)-(i))	mid - 4 years	0	4 years stayed per 654
Allegation PC186.22(b)(1)	mid - 2 years	0	2 years stayed per 654

Total term 19 years and 4 months

[X] Appearance

[] Ex Parte

PEOPLE OF THE STATE OF CALIFORNIA

vs.

RODRIGUEZ, JAVIER ESPINOZA

ESPINOSA, JAVIER RODRIGUEZ

COURT NO.	DEPT & JUDGE
SCS-176087	SBSC 14 HERNANDEZ, E.
DA FILE NO.	ATTORNEY - RET
BAL57602	SANCHEZ
DATE/TIME	PROBATION OFFICER
10/14/2003 09:00AM	WOODWARD, K
PROB. NO.	PROB. OFFICER PHONE
A-000788070	(619) 441-3483

REASON FOR REPORT:

The defendant was last before this Court on 09/15/2003, at which time there were questions regarding the Prison Term breakdown. The information has been revised, and the defendant is before the Court today for sentencing.

Prison Term Analysis:

The sentencing options available for Count 1 PC459, Count 2 PC136.1(b)(1), Count 3 PC12025(b)(3), and Count 4 PC12031(a)(1) are 16 months, 2 or 3 years. In that the aggravating and mitigating factors appear balanced, the recommendation would be for the middle term in each case.

The allegation per PC186.22(b)(1) carries an additional 2, 3, or 4 years consecutive term for each felony which has been committed, at the Court's discretion. In that no mitigants or aggravants were noted, the recommendation would be for the middle term of 3 years. However, in that Count 2 PC136.1(b)(1) is considered a serious felony, the allegation as to that count is 5 years consecutive per PC186.22(b)(1)(B).

The allegation per PC12022.5(a)(1) carries an additional and consecutive term of 3, 4, or 5 years. In that no aggravating or mitigating factors were noted, the presumptive middle term of 4 years is recommended.

As regards to concurrent vs. consecutive sentencing, consecutive sentencing appears appropriate in Counts 1 and 2 per Rule 4.425(a)(1), that the crimes and objectives were predominately independent of each other. Additionally, that Count 3 and 4 be stayed per PC654 in that it represents the same course of conduct as in the PC12022.5(a)(1) allegation. Furthermore, that the PC186.22(b)(1) allegations in Counts 1, 3, and 4 also be stayed per PC654 in that they represent the same course of conduct as the allegation in Count 2.

Additionally, the Strike prior per PC667(b)-(i) indicates that the given term be doubled per PC667(e)(1).

Count 2 has been selected as the primary term in that it carries the most custody time.

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Term Recommendation Breakdown by Count is as Follows:

	<u>Suggested Base Term</u>	<u>Recommended Term</u>	<u>Recommended Stay</u>
mt 2 186.1(b) (1) PC667(b) - (i))	mid - 4 years	4 years	0
legation 186.22(b) (1)	5 years (consecutive)	5 years	0
legation 22.5(a) (1)	mid- 4 years (consecutive)	4 years	0
mt 1 159:Second Degree PC667(b) - (i))	1/3 mid - 16 months (consecutive)	16 months	0
legation 186.22(b) (1)	mid - 3 years	0	3 years stayed per 654
mt 3 2025(b) (3) PC667(b) - (i))	mid - 4 years	0	4 years stayed 654
legation 186.22(b) (1)	mid - 3 years	0	3 years stayed per 654
mt 4 2031(a) (1) PC667(b) - (i))	mid - 4 years	0	4 years stayed per 654
legation 186.22(b) (1)	mid - 3 years	0	3 years stayed per 654

Total term 14 years and 4 months

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DATA:

<u>Confined</u>	<u>Date Released</u>	<u>Place</u>	<u>Custody Days</u>
10/2003	10/14/2003	CJ	157
		PC2933.1 credits	23
		TOTAL CTS	180

RECOMMENDATION:

probation be denied and the defendant be committed to the Department of Corrections for the term of 14 years 4 months with credit for time served of 157 actual days and 23 PC2933.1 PC credits, a total of 180 days credit; that the defendant pay a restitution pursuant to 1202.4(b) PC in the amount of \$10,000 to be paid forthwith or as provided by 12085.5 PC, that restitution in the amount of \$250.00 be paid jointly and severally with co-defendant Jose Leon to victim Deborah Tucker ; further, that the defendant pay an additional restitution fine pursuant to 1202.45 PC in the amount of \$10,000 to be paid and remain so unless defendant's parole is revoked.

Respectfully submitted,

DAVID E. CRANFORD
(Acting) Chief Probation OfficerBy: *Kelly Woodward*
Kelly Woodward
DEPUTY PROBATION OFFICERApproved *Elaine Villalpando*
Elaine Villalpando, SUPERVISOR

I have read and considered the foregoing report.

Esther Alvarado
JUDGE OF THE SUPERIOR COURT

/07/03 klw)

08.2185p (Rev. 07/24/03)✓✓

ADULT SERVICES

SEP 1 0 2008

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PROBATION OFFICER'S REPORT

PEOPLE OF THE STATE OF CALIFORNIA v. RODRIGUEZ, JAVIER E RODRIGUEZ, JAVIER ESPINOZA ESPINOSA, JAVIER RODRIGUEZ				COURT NO. SCS-176087		DEPT. & JUDGE SBSC DEPT. 14 HERNANDEZ, E.	
				DA FILE NO. BAL57602		ATTORNEY SANCHEZ, B RET	
				HEARING DATE/TIME 09/15/2003 09:00AM		PROB CASE NO. A-000788070	
				PROBATION OFFICER WOODWARD, K		PO TEL. NO. (619) 441-3483	
ADDRESS ALTADENA AVE SAN DIEGO, CA 92115-5178				TEL. NO. (619) 280-3925		BIRTHPLACE/CITIZENSHIP SAN DIEGO CA US	
DATE 10/10/1976	AGE 26	RACE HIS/LAT/MEX	SEX MALE	HT 5'06"	WT 170	EYES BROWN	HAIR BLACK
DRIVER'S LIC. NO. 44475839		INS. NO.		OTHER ID DATA TT RIGHT ARM "SIDRO", 3 DOTS LEFT HAND ON CHEST CLOWN AND EVELIA			
DATE OFFENSE COMMITTED 11/11/2003		DATE CONVICTED 08/15/2003		HOW GUILTY BY JURY		CUSTODY STATUS CUSTODY	
INVESTIGATING ARRESTING AGENCY SANTA VISTA POLICE DEPARTMENT			DATE INFO FILED 06/09/2003			SDSO SYSTEM NO. 94188 014154	
II NO. 11432421		FBI NO. 485416DB0		ARREST REPORT NO. 0308732		SDSO BOOKING NO. 03118814A	

CONVICTED OF:

COUNT 01	PC459:SECOND DEGREE	BURGLARY
ALLEGATION	PC186.22 (b) (1)	CRIME COMMITTED TO BENEFIT CRIMINAL CONDUCT OF STREET GANG
COUNT 02	PC136.1 (b) (1)	PREVENT/DISSUADE WITNESS/VICTIM FROM REPORTING A CRIME
ALLEGATION	PC186.22 (b) (1)	
ALLEGATION	PC12022.5 (a) (1)	PERSONAL USE OF A FIREARM
COUNT 03	PC12025 (b) (3)	HAVING CONCEALED FIREARM IN VEHICLE
ALLEGATION	PC186.22 (b) (1)	
COUNT 04	PC12031 (a) (1)	CARRY LOADED FIREARM IN PUBLIC PLACE
ALLEGATION	PC186.22 (b) (1)	
PRIOR	PC667 (b) - (i) / 668	1ST STRIKE PRIOR

PRE PLEA AGREEMENT:

Guilty by Jury.

RECOMMENDATION: State Prison

GUEZ, JAVIER E

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DEFENDANT(S):

Jose Luis: Found Guilty by Jury of same charges and is scheduled for Probation Hearing and Sentencing on 09/15/03 at SBSC-14 at 9:00 am.

RELATED COURT DATA:OFFENSE:

SOURCES OF INFORMATION for this section

Chula Vista Police reports.

That the defendant was found guilty by a jury, additional information may have been provided to the Court, but not the undersigned officer. The following synopsis of the offense was obtained from provided police reports.

On 05/11/2003, at approximately 2:00 am, Chula Vista Police were dispatched to a vehicle burglary in process. The witness reported that two male suspects were breaking into a Volkswagen Jetta in an apartment complex parking lot. It was also reported that when the suspects were told that the police were going to be called, a handgun was fired into the air. (As to Count 2) The two suspects then got into a dark colored SUV and left the scene.

When the first officer arrived on the scene, a green Ford Explorer was leaving the parking lot with its headlights turned off. The officer followed the vehicle until additional vehicles arrived, and then a traffic stop was initiated. The Ford Explorer pulled over, and as the officer exited his vehicle, co-defendant Jose Leon, exited from the vehicle's passenger side and began running away from the vehicle. Initially, he did not follow officers commands to stop. A short distance later he stopped and was taken into custody.

While being arrested, Leon admitted to having a gun. A loaded .22 caliber larger handgun was found in his waistband. (As to Counts 3 and 4) Also, 13 rounds of .22 caliber ammunition was discovered in his pockets.

Leon stated that he had just purchased the gun and did not have a permit. A records check on the gun's serial number was conducted with negative findings.

It was also noted that there was an odor of an alcoholic beverage coming from Leon.

the driver of the vehicle, the defendant, Javier Rodriguez was removed from the vehicle at gunpoint. He was non-compliant with the directives of the officers, and was physically taken to the ground. In that Leon had been in possession of a gun, and Rodriguez was non-compliant and intoxicated, he was shot with a taser gun. Rodriguez was finally able to be detained and handcuffed. After his arrest, he continued to be physically and verbally non-compliant. A field sobriety test was conducted with negative results.

The vandalized vehicle, a white Jetta, had both its driver and passenger side windows broken. The automatic gear shift was also broken. The glove compartment was open and there was a brick lying on the front passenger floorboard. Near the vehicle, a crowbar and a .22 caliber casing was found on the ground. The victim, Donna Tucker, reported that her car manual, her work identification card and her gas card were missing. She thought that there may have been additional items taken from the vehicle.

The victim was driven to the defendants vehicle, and she was able to identify her car manual, an ID card, a gas card, a mini-headset telephone, and a small clock. The gas card was released to Tucker, while the other items were taken as evidence. (As to Count 1)

Both defendants were positively identified by witnesses. Leon was identified as the individual who broke into the vehicle, and Rodriguez was identified as the individual who shot the handgun.

After being Mirandized, both defendants refused to give a statement and were transported and booked into County Jail.

VICTIMS:

RESTITUTION: \$250.00, to be paid jointly and severely with co-defendant Jose Leon.

VICTIM NOTIFIED OF P&S HEARING: Yes

INTENDS TO APPEAR: No

SOURCES OF INFORMATION for this section

see below.

Victim letter was mailed to DONNA TUCKER informing her of her rights per California law and requesting any information regarding any losses suffered as a result of the instant matter.

Tucker reported that her vehicle was covered by insurance and the only restitution that she is seeking is \$250 for her deductible. She did not wish to make any additional statements.

DEFENDANT'S STATEMENT:SOURCES OF INFORMATION for this section

Interview with the defendant on 09/04/03 at the South Bay Detention Facility.

The defendant did not provide a written statement. He stated that on the night of the instant matter, he and Leon had gotten together. He explained that he had known Leon's older brother, who is currently in State Prison. They began drinking and each took approximately 5 "rochas." He did not have any recollection of how they ended up at the vehicle, and added that he had no plan or intent to burglarize the vehicle. However, he stated that his actions were "old behavior." When questioned about the gun, he stated that he had it in the vehicle for a long time, hidden in the spare tire. He explained that he fired the gun into the air "to show off," not to hurt anybody. Regarding his arrest, he stated that he was under the influence and was "slowed down" from the rochas. He explained that it was hard for him to follow the officers instructions and passed out numerous times during his arrest. He does not recall a sobriety test being conducted on him.

Over the past couple of years, the defendant reported that he has been trying to do things right." He moved away from his neighborhood and has been supporting his wife and children. He described himself as a productive member of society.

He did admit to a drug and alcohol problem. He stated that while in custody, he has admitted to this addiction and realizes that he needs help. He has been attending Narcotics Anonymous, Alcoholics Anonymous, and Substance Abuse Classes while in custody.

Additionally, he has attended classes to receive his high school diploma, HIV class, and parenting class. He has also requested information regarding the Delancey Street Treatment program in Los Angeles, which is a year program for substance abuse and job training. In the future, he hopes to become a certified counselor, working with youth involved with gangs and drug abuse.

The defendant takes full responsibility for his actions, and although he is aware that a prison commit is likely, he hopes that the Judge will consider giving him another opportunity on Probation. If granted Probation, he will abide by its conditions.

CRIMINAL HISTORY:

SOURCES OF INFORMATION for this section

II/FBI and Local Computer Clearances.

DATE	AGENCY	CHARGE	DISPOSITION
03/09/1996	CVPD	VC23152 (b) Driving Under the Influence	S104534: 05/14/96; misd, pg, 3 yrs crt prob. 07/19/96; revk, wi. 12/30/96; revk, reins. 03/13/97; revk, wi. 04/04/97; revk, reins 06/03/97; revk. 07/01/97; remanded into custody 120 dys. 04/18/01; PC1203.4 petition granted.
05/20/1997	SDPD	Cnt 1 VC10851(a) Taking Vehicle w/out Owners Consent, Cnt 2 PC496 Buying Stolen Property, Cnt 3 PC466 Posses Burglary Tools.	SF-115773: 07/01/97; fel, pg cnt 1 3 yrs f prob. 01/05/98; revk. 01/26/99 revk, reins. 03/03/99; revk. 06/08/99; revk, reins. 04/16/01; PC1203.4 Petition granted.
The defendant was arrested driving a stolen vehicle. At the time of his arrest, he was in possession of a screwdriver, a multi-tool, and several keys. He denied knowledge that the vehicle was stolen, reporting that he had borrowed it from a friend.			
02/18/1998	CVPD	VC14601.2 Driving on Suspended License after DUI Conviction.	S134726: 02/09/99; fta for arraign. bwi. 06/04/99; png. 07/06/99; pg, 3 yrs crt prob.

11/1999 SDPD

Cnt 1 PC459
Burglary Cnt 2
PC136.1
Preventing or
Dissuading From
Attending or
Giving Testimony
Cnt 3 Terrorist
Threats

SCD-142327: 02/03/99;
fel, png. 04/22/99; cop.
06/08/99; pg cnt 1 3 yrs
f prob, \$250 fine, \$324
restit, 365 dys jl.

the defendant, after being asked to leave the victim's residence, was observed by the victim in her garage taking a tire and a rim. She subsequently discovered that a total of four tires, four rims, a cell phone, and pager were missing. The defendant was identified by the victim and arrested by the police. The victim also reported receiving threatening telephone calls from the defendant and his friends. Upon his arrest, the defendant denied taking the items or making threatening calls to the victim. None of the property was ever recovered.

1/01/2000 SDPD

VC14601.5
Driving While
Privileges
Suspended for
Specific BAL

S146248: 02/03/00; png,
misd. 02/24/00; cop, 3
yrs crt prob, fine.

05/11/2003 CVPD

COUNT 01
PC459:SECOND
DEGREE
BURGLARY
ALLEGATION
PC186.22(b)(1)
CRIME COMMITTED
TO BENEFIT
CRIMINAL
CONDUCT OF
STREET GANG
COUNT 02
PC136.1(b)(1)
PREVENT/DISSUADE
WITNESS/VICTIM
FROM
REPORTING A
CRIME
ALLEGATION
PC186.22(b)(1)
ALLEGATION
PC12022.5(a)(1)
COUNT 03
PC12025(b)(3)
HAVING CONCEALED
FIREARM IN
VEHICLE
ALLEGATION
PC186.22(b)(1)
COUNT 04
PC12031(a)(1)
CARRY LOADED
FIREARM IN
PUBLIC PLACE
ALLEGATION
PC136.22(b)(1)
PRIOR
PC667(b)-(i)/668
1ST STRIKE PRIOR

SCS-176087: GUILTY BY
JURY ALL FOUR COUNTS,
AND ALLEGATIONS PER
PC186.22(b)(1). INSTANT
MATTER.

PROBATION AND PAROLE:

SOURCES OF INFORMATION for this section

Local Computer Clearances and Probation records.

Defendant received his first misdemeanor and grant of Court probation in 1996 in case S104534 for Driving Under the Influence. This grant of probation was revoked numerous times and was finally revoked with the defendant being remanded into custody for 120 days.

0194

also received his first felony conviction in case SF-115773. During his grant he was again non-compliant and his probation revoked on numerous occasions for failure to report, failure to test and possession of gang paraphernalia. He also failed to remain law-abiding and received a second misdemeanor conviction in case S134726 for Driving on a Suspended license and a new felony case SCD-142327 for Burglary.

After serving 365 days in custody in case SCD-142327, although he initially had problems, as time went on, he appeared to adjust to Probation with no revocations. However, he did receive another misdemeanor conviction for driving on a Suspended License. His grant was allowed to expire, with him being in compliance, on 06/07/2002.

Although in the past, the defendant appeared to have had difficulties adjusting to Probation; during his most recent grant of Probation his grant expired successfully.

PERSONAL DATA

The following information was offered by the defendant. Unless noted otherwise it has not been verified.

Birth Place and Areas of Residence:

The defendant was born in San Diego and has resided here his entire life.

Current Living Situation:

At the time of his arrest, he was living with his wife and their two children.

Family Relationships:

His parents are married and live in San Ysidro. He has 5 brothers and 3 sisters. Although he stated he is close to his mother and siblings, he needs to make "amends" with his father. According to him, his father was emotionally and physically abusive while he was growing up.

Marital Status and Dependents:

He married his girlfriend of four years, Gloria, while he was in custody. He states that she is very supportive of him. They have two sons, ages 3 and 6 months.

Family Criminal History:

He stated that three of his brothers have been involved in gang activity.

Acquaintances:

He spends his time with his wife and children.

Social Activities:

enjoys sports.

Education:

defendant attended Southwest High School, however dropped out after the 11th grade. He then attended continuation high school, but eventually received his GED through the Job Corp. While in custody, he has been taking classes in order to receive his high school diploma.

Military Service:

me.

Employment History:

the time of his arrest, he was employed as a concrete finisher for a local union where he has been employed for approximately 1 1/2 years. In the past, he has been employed as a forklift operator, and doing warehouse work. When he was younger he worked for fast food restaurants.

on his release from custody, he will be able to return to his job.

Financial Information:

stated that he had been "doing good." However, since his arrest, his credit card bills have gone unpaid and wife is receiving AFDC.

Psychological and Medical Problems:

enies.

Substance Abuse and Treatment History:

the age of 11, he first tried beer. By junior high his drinking had increased and he considered himself a "heavy" drinker. He admits to regular use of alcohol and believes that he has a drinking problem. At 11, he also began smoking marijuana everyday. He continued using on and off, however, has not used since he was last in custody. He also began experimenting with cocaine and methamphetamine at that age. He stated that he only used cocaine a couple of times, however, admits to currently using methamphetamine "on the weekends," last using the night of the instant matter. He has also use "rochas" on several occasions, including the night of his arrest. As a juvenile, he experimented with mushrooms, PCP and

While he has been in custody, he has attended substance abuse classes, Narcotics Anonymous, and Alcoholics Anonymous. He stated that he has become aware that he has a problem with alcohol and drugs, and is ready to address the issue.

g Affiliation:

has been involved in the "Sidro" gang since he was 11, however stated that he has not affiliated with them recently. He stated he wants to leave that life behind. He also stated that he would like to have his gang tattoos removed.

er CalGangs, the defendant is a documented gang member, who self-reported his affiliation to SDPD in 1991. His moniker is "Casco" and also is know as "Javi."

migration Status:uture Plans:

in five years, he hopes to be spending time with his family, having money, buying money for a house, and hopes to be volunteering his time with youth involved in gangs and drugs.

COLLATERAL INFORMATION:

SOURCES OF INFORMATION for this section

see below.

in efforts to gather any additional information that may have come to light during the trial, DDA S. Roach and Defense Attorney B. Sanchez were contacted and messages were left.

Attorney Sanchez stated that this was a very tough case. He believes that the defendant is no longer a gang member, and has made substantial positive changes in his life, moving from his neighborhood, working and supporting his family. However, the defendant has a drug problem, which eventually led to the instant offense. Mr. Sanchez also added that he believes that since the instant matter the defendant has "seen the light."

that it may not be clear what "rochas" are, the undersigned located information which identified "rochas" as a street name for Rohypnol, a sedative-hypnotic drug.

SENTENCING DATA: AS TO ALL COUNTSPossible Circumstances in Mitigation:

Rule 4.423(a)(4): Although not amounting to a defense, at the time of the instant matter, the defendant reported that he had been drinking and had taken 5 "rochas."

Rule 4.423(b)(6): The defendant's performance on his last grant of Formal probation was satisfactory and was allowed to expire successfully.

Possible Circumstances in Aggravation:

Rule 4.421(b)(2): The defendant's prior convictions are numerous in that he has three prior misdemeanors and 2 prior felonies, one included a similar act in that the defendant stole items from the victim and then he and his friends would call and threaten her.

Rule 4.408(a): At the time of his arrest, the defendant was non-compliant and a taser gun needed to be used to detain him.

Possible Circumstances in Mitigation and Aggravation: As to the PC186.22(b)(1) allegation in Counts 1, 3, and 4.

None noted.

Possible Circumstances in Mitigation and Aggravation: As to the PC12022.5(a)(1) allegation in Count 2.

None noted.

Prison Term Analysis:

The sentencing options available for Count 1 PC459, Count 2 PC136.1(b)(1), Count 3 PC12025(b)(3), and Count 4 PC12031(a)(1)) are 16 months, 2 or 3 years. In that the aggravating and mitigating factors appear balanced, the recommendation would be for the middle term in each case.

The allegation per PC186.22(b)(1) carries an additional 1, 2, or 3 years consecutive term for each felony which has been committed, at the Court's discretion. In that no mitigants or aggravants were noted, the recommendation would be for the middle term of 2 years. However, in that Count 2 PC136.1(b)(1) is considered a violent felony, the allegation as to that count is 10 years consecutive per PC186.22(b)(1)(C).

The allegation per PC12022.5(a)(1) carries an additional and consecutive term of 3, 4, or 10 years. In that no aggravating or mitigating factors were noted, the presumptive middle term of 4 years is recommended.

In regards to concurrent vs. consecutive sentencing, consecutive sentencing appears appropriate in Counts 1 and 2 per Rule 4.425(a)(1), that the crimes and objectives were predominately independent of each other. Additionally, that Count 3 and 4 be stayed per PC654 in that it represents the same course of conduct as in the PC12022.5(a)(1) allegation. Furthermore, that the PC186.22(b)(1) allegations in Counts 1, 3, and 4 also be stayed per PC654 in that they represent the same course of conduct as the allegation in Count 2.

Additionally, the Strike prior per PC667(b)-(i) indicates that the given term be doubled per PC667(e)(1).

Count 2 has been selected as the primary term in that it carries the most custody time.

EVALUATION:Probation Eligibility:

Section 4.413(b): The defendant is absolutely ineligible for Probation pursuant to PC667(b)-(i). Additionally, per PC1203.06(a)(1)(M), this allegation makes the defendant absolutely ineligible for Probation. Due to this ineligibility, circumstances supporting or denying a grant of Probation will not be addressed.

Discussion:

Appearing before the Court today is 26-year-old Javier Rodriguez, having been found guilty by a jury of PC459 Burglary: Second Degree, PC136.1(b)(1) Prevent/Dissuade Witness/Victim from Reporting a Crime, PC12025(a)(3) Carrying Concealed Weapon in Vehicle, PC12031(a)(1) Carry Loaded Firearm in Public Place, PC186.22(b)(1) Crime for the Benefit of a Street Gang, and an allegation in each count, and a PC12022.5(a)(1) allegation in Count 2. In this case, the defendant and co-defendant Leon were observed burglarizing a vehicle. When witnesses informed them that they were going to call the police, the defendant fired a handgun into the air. They drove away from the scene, however, were pulled over by police. The defendant was non-cooperative during the arrest and a taser gun needed to be used. In that he exhibited signs of being under the influence, a sobriety test was conducted with negative results. The co-defendant was found to have a loaded .22 caliber handgun in his waistband. Additionally, property belonging to the victim was located in their vehicle. After declining to give a statement, he was transported and booked into County Jail.

The victim, Donna Tucker is requesting \$250 in restitution for her insurance deductible. She did not wish to make any additional statements. It is being requested that restitution be jointly and severally paid by the defendants in the amount of \$125 each.

Regarding to the instant matter, the defendant stated he had no intentions of burglarizing the vehicle, or harming anyone with the gun. Although the defendant reported that he was under the influence of alcohol and "rochas," at the time of the instant matter, he takes full responsibility for his actions. He described these actions as "old behavior." Furthermore, although the defendant is documented in Cal Gangs, he contends that he has "changed his life" by moving from his neighborhood and not affiliating with his friends anymore. Additionally, he stated that he now realizes that he has substance abuse issues and hopes to address them.

In light of the proven "strike" prior and pursuant to PC1203.06(a)(1)(M), the defendant is absolutely ineligible for Probation.

Considering all the facts provided in this case, the undersigned respectfully submits the following recommendation for the Court's approval.

STODY DATA:

<u>Date Confined</u>	<u>Date Released</u>	<u>Place</u>	<u>Custody Days</u>
5/11/2003	09/15/2003 (In custody)	CJ	128
		PC2933.1 credits	<u>19</u>
		TOTAL CTS	147

RECOMMENDATION:

that probation be denied and the defendant be committed to the Department of Corrections for the term of 19 years 4 months with credit for time served of 128 actual days and 19 days 2933.1 PC credits, a total of 147 days credit; that the defendant pay a restitution fine pursuant to 202.4(b) PC in the amount of \$10,000 to be paid forthwith or as provided in 2085.5 PC, that restitution in the amount of \$250.00 be paid jointly and severally with the co-defendant Jose Leon to victim Deborah Tucker ; further, that the defendant pay an additional restitution fine pursuant to 202.45 PC in the amount of \$10,000 to be suspended and remain so unless defendant's parole is revoked.

176087

0200

Term Recommendation Breakdown by Count is as Follows:

<u>Count</u>	<u>Suggested Base Term</u>	<u>Recommended Term</u>	<u>Recommended Stay</u>
Count 2 PC136.1(b)(1) PC667(b)-(i))	mid - 4 years	4 years	0
Allegation PC186.22(b)(1)	10 years (consecutive)	10 years	0
Allegation PC12022.5(a)(1)	mid- 4 years (consecutive)	4 years	0
Count 1 PC459:Second Degree PC667(b)-(i))	1/3 mid - 16 months (consecutive)	16 months	0
Allegation PC186.22(b)(1)	mid - 2 years	0	2 years stayed per 654
Count 3 PC12025(b)(3) PC667(b)-(i))	mid - 4 years	0	4 years stayed per 654
Allegation PC186.22(b)(1)	mid - 2 years	0	2 years stayed per 654
Count 4 PC12031(a)(1) PC667(b)-(i))	mid - 4 years	0	4 years stayed per 654
Allegation PC186.22(b)(1)	mid - 2 years	0	2 years stayed per 654

Total term 19 years and 4 months

Respectfully submitted,

DAVID E. CRANFORD
(Acting) Chief Probation Officer

By: Kelly Woodward

Kelly Woodward
DEPUTY PROBATION OFFICER

Approved

Elaine Villalpando
Elaine Villalpando, SUPERVISOR

have read and considered the foregoing report.

Esther Hernandez
JUDGE OF THE SUPERIOR COURT

09/01/03 klw)

PROB.2185 (Rev. 07/24/03)✓✓

0202

ATTORNEY OR PERSON WITHOUT ATTORNEY (N. state bar number, and
 address):
 Recording by County Recorder requested by and return to:
 Name:
 Address:
 Unit No.:
 City/State:
 Zip Code:
 TELEPHONE NO: FAX NO. (Optional):
 E-MAIL ADDRESS (Optional):
☐ ATTORNEY FOR ☐ JUDGMENT CREDITOR ☐ ASSIGNEE OF RECORD
 Insert name of court, branchcourt, if any, and post office, and street address:
 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
☐ County Courthouse, 220 W. Broadway, San Diego, CA 92101-3409
☐ East County Division, 250 E. Main St., El Cajon, CA 92020-3941
☐ Juvenile Division, 2851 Meadowlark Dr., San Diego, CA 92123
☐ North County Division, 325 S. Melrose Dr., Vista, CA 92083-6695
☐ South County Division, 500 3rd Ave., Chula Vista, CA 91910-5649

FOR RECORDER'S USE ONLY

CASE NUMBER:

CS176087

CASE NAME:

Javier Rodriguez and Jose Leon

FOR COURT USE ONLY

ORDER FOR RESTITUTION AND ABSTRACT OF JUDGMENT
 Penal Code, §§ 1202.4(f), 1214; Welfare and Institutions Code, § 730.6(h) & (i)

ORDER FOR RESTITUTION

1. a. ☒ On (date): 10/14/03
 defendant (name): Jose Leon + Javier Rodriguez
 was convicted of a crime that entitles the victim to restitution.
 b. ☐ On (date):
 child (name):
 was found to be a person described in Welfare and Institutions Code section
 602, which entitles the victim to restitution. ☐ Wardship is terminated.
 c. ☐ Parents or guardians jointly and severally liable (name each):
 d. ☐ Co-offenders found jointly and severally liable (name each):

2. Evidence was presented that the victim named above suffered losses as a result of defendant's/child's conduct.
 Defendant/child was informed of his or her right to a judicial determination of the amount of restitution and
 a. ☐ a hearing was conducted. b. ☐ stipulated to the amount of restitution to be ordered. c. ☐ waived a hearing.

3. THE COURT ORDERS defendant/child to pay restitution to

- a. ☒ the victim (name): Donna Tucker in the amount of: \$ 250,00
 b. ☐ the State Victim Compensation Board, to reimburse payments to the victim(s) from the Restitution Fund,
 in the amount of: \$
 c. ☐ plus interest at 10% per year from the date of ☐ loss or ☐ sentencing
 d. ☐ plus attorney fees and collection costs in the sum of \$
 e. ☐ plus a 10% administrative fee of the restitution owed (Pen. Code § 1202.4(l); Welf. & Inst. Code § 730.6(q))

4. The amount of restitution includes

- a. ☒ value of property stolen or damaged
 b. ☐ medical expenses
 c. ☐ lost wages or profits
 (1) ☐ incurred by victim due to injury
 (2) ☐ of victim's parent(s) or guardian(s) (if victim is a child) incurred while caring for the injured child
 (3) ☐ incurred by victim due to time spent as a witness or in assisting police or prosecution
 (4) ☐ of victim's parent(s) or guardian(s) (if victim is a child) due to time spent as a witness or in assisting or
 prosecution
 d. ☐ noneconomic losses (felony violations of Penal Code section 288 only)
 e. ☐ other (specify):

Date:

JUDICIAL OFFICER

VICTIM TO RECEIVE CERTIFIED COPY FOR FILING WITH COUNTY RECORDER

0203

CASE NAME:

Javier Rodriguez + Jose Lem

CASE NUMBER:

CS176087

NOTICE TO VICTIMS

PENAL CODE SECTION 1214 PROVIDES THAT ONCE A DOLLAR AMOUNT OF RESTITUTION HAS BEEN ORDERED, THIS ORDER IS THEN ENFORCEABLE AS IF IT WERE A CIVIL JUDGMENT. ALTHOUGH THE CLERK OF THE COURT IS NOT ALLOWED TO GIVE LEGAL ADVICE, YOU ARE ENTITLED TO ALL RESOURCES AVAILABLE UNDER THE LAW TO OBTAIN OTHER INFORMATION TO ASSIST IN ENFORCING THE ORDER.

THIS ORDER DOES NOT EXPIRE UNDER PENAL CODE SECTION 1214(d).

THE VICTIM SHALL FILE A SATISFACTION OF JUDGMENT WITH THE COURT WHENEVER AN ORDER TO PAY RESTITUTION IS SATISFIED, PURSUANT TO PENAL CODE SECTION 1214(d).

APPLICATION FOR ABSTRACT OF JUDGMENT

The ☐ judgment creditor ☐ assignee of record ☐ other (specify):
applies for an abstract of judgment and represents the following:

a. Judgment debtor's

Name and last known address

Name: Jose Lem
Address:
Unit No.:
City/State:
Zip Code:

Javier Rodriguez

b. ☒ Driver's license No. and state: none D3673306
c. ☐ Social Security No.:
d. ☒ Date of Birth: 9/27/84

☐ Unknown
☐ Unknown
☐ Unknown

CA 84475839

10/10/76

(TYPE OR PRINT NAME)

(SIGNATURE OF APPLICANT OR ATTORNEY)
☐ ON INFORMATION AND BELIEF

ABSTRACT OF JUDGMENT

6. I certify that the following is a true and correct judgment entered in this action.
7. Judgment creditor (name):
☐ whose address or whose attorney's address appears on this form above the court's name.
8. Judgment debtor (full name as it appears in judgment):
9. Judgment entered on (date):
10. Total amount of judgment as entered or last renewed: \$

[SEAL]

This abstract of judgment issued on (date):

Clerk, by _____, Deputy

NOTICE TO COUNTY RECORDER

THIS ORDER IS ENFORCEABLE AS IF IT WERE A CIVIL JUDGMENT, PURSUANT TO PENAL CODE SECTION 1202.4(l) AND (m), PENAL CODE SECTION 1214, AND WELFARE AND INSTITUTIONS CODE SECTION 730.6(l) AND (r), AND FUNCTIONS AS AN ABSTRACT OF JUDGMENT.

CR-110/JV-790 ADDENDUM
FOR COURT USE ONLY

0204

CASE NAME:

ADDENDUM TO ORDER FOR RESTITUTION
AND ABSTRACT OF JUDGMENT

CASE NUMBER:

*[Continued from Page One and Page Two]*1. ☐b. ☐c. ☐d. ☐2. ☐☐4. ☐5. ☐6. ☐7. ☐8. ☐9. ☐10. ☐

Date:

JUDICIAL OFFICER

REPORTER TRANSCRIPTS ARGUMENTED

COURT OF APPEAL -- STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA) FROM SAN DIEGO COUNTY
)
 PLAINTIFF AND RESPONDENT,) HON. ESTEBAN HERNANDEZ,
) JUDGE
 VS.)
) APPEAL NO. D043198
 JAVIER RODRIGUEZ,) NO. SCS176087
)
 DEFENDANT AND APPELLANT.) **JURY VOIR DIRE**

REPORTER'S TRANSCRIPT ON APPEAL -- AUGMENT

AUGUST 5, 2003

AUGUST 7, 2003

SAN DIEGO, CALIFORNIA

VOL. 1

PAGES 1 -- 174

COPY

APPEARANCES:

FOR THE PLAINTIFF AND RESPONDENT: BILL LOCKYER
ATTORNEY GENERAL
STATE OF CALIFORNIA
110 WEST A STREET
SAN DIEGO, CA. 92101

FOR THE DEFENDANT AND APPELLANT: ROBERT L. SWAIN
ATTORNEY AT LAW
964 FIFTH AVENUE, STE. 214
SAN DIEGO, CA. 92101

REPORTED BY: IRENE PERKINS, CSR 12727

1 CHULA VISTA, CALIFORNIA; TUESDAY, AUGUST 5, 2003; 10:36 A.M.

2 THE COURT: BEFORE WE GET STARTED, I WANTED TO JUST
3 PUT ON THE RECORD THAT I DID A LITTLE BIT OF RESEARCH, AND I
4 FOUND A CASE. IT'S AN UNPUBLISHED CASE, BUT IT'S
5 NEVERTHELESS HELPFUL FOR IT'S ANALYSIS. IT'S PEOPLE V.
6 RAMIREZ & SANDOVAL. IT'S FOUND AT 2002 CAL.APP.UNPUB LEXIS
7 10665. AND THE COURT NUMBER IS G029236.

8 THIS WAS A CASE DEALING WITH A VERY SIMILAR SITUATION
9 WHERE THE COURT -- THE TRIAL COURT WAS DECIDING WHETHER TO
10 ADMIT THE DEFENDANT'S JUVENILE ADJUDICATION. AND THERE THE
11 TRIAL COURT DID ADMIT THE DEFENDANT'S JUVENILE COURT
12 ADJUDICATIONS AS EVIDENCE OF THE GANG ENHANCEMENT OF 186.22.
13 AND IT WAS OVER DEFENSE OBJECTION.

14 AND THE COURT OF APPEALS ON REVIEW FOUND THAT THAT WAS
15 PROPER. AND, SPECIFICALLY, THE COURT OF APPEAL SAID, "THE
16 JURY WAS SUBSEQUENTLY INSTRUCTED THAT EVIDENCE OF THE
17 DEFENDANT'S PAST CRIMES WOULD BE CONSIDERED ONLY FOR THE
18 LIMITED PURPOSE OF DETERMINING IF IT TENDS TO SHOW, ONE, THE
19 PATTERN OF CRIMINAL GANG ACTIVITY, TWO, KNOWLEDGE OF ONE OF
20 THE PRIMARY ACTIVITIES OF THE LA JOLLA CRIMINAL STREET GANG."

21 AND THEN FURTHER ON, THE COURT OF APPEAL SAID, "BECAUSE
22 THE EVIDENCE WAS HIGHLY RELEVANT TO SHOW THAT MARK, AS A
23 MEMBER OF THE LA JOLLA CRIMINAL STREET GANG, ENGAGED IN A
24 PATTERN OF CRIMINAL GANG ACTIVITY, THE COURT'S DECISION TO
25 ADMIT HIS JUVENILE ADJUDICATION WAS NOT AN ABUSIVE
26 DISCRETION. AND IT CITED TO PEOPLE V. FUNES, F-U-N-E-S,
27 WHICH IS '94 -- IT'S A 1994 CASE AT 23 CAL.APP.4TH 1506 CITE
28 1518. SO THERE IT WAS A JUVENILE ADJUDICATION, AND IT WAS

1 THE DEFENDANT'S OWN PRIOR OFFENSES THAT WERE USED FOR THE
2 PREDICATE ACTS. AND EVEN THOUGH IT'S NOT BINDING AUTHORITY,
3 SINCE IT'S AN UNPUBLISHED OPINION, NEVERTHELESS, THE ANALYSIS
4 SEEMS VERY PALPABLE.

5 AND AT THIS POINT, I'LL JUST OPEN IT UP AND ASK, SINCE I
6 LEFT IT OPEN AT THE END OF DAY, DID COUNSEL COME UP WITH ANY
7 ADDITIONAL AUTHORITY THAT YOU WANTED ME TO CONSIDER AT THIS
8 TIME?

9 MR. LEAHY: NO, YOUR HONOR. I DID NOT.

10 THE COURT: MR. SANCHEZ?

11 MR. SANCHEZ: NO, YOUR HONOR.

12 THE COURT: OKAY. ALL RIGHT. OKAY. IS THERE
13 ANYTHING ELSE THAT WE NEED TO TAKE UP BEFORE WE BRING IN THE
14 JURY?

15 MR. LEAHY: YOUR HONOR, I JUST WANTED TO PUT ON THE
16 RECORD THAT I HAVE RETRIEVED JOSE LEON'S JUVENILE FILE
17 RELATING TO THIS 211, AND I HAVEN'T HAD A CHANCE TO
18 THOROUGHLY REVIEW IT. BUT I WOULD ASK AT SOME POINT TO HAVE
19 A 402 HEARING AS TO WHETHER OR NOT THE CO-PARTICIPANTS IN
20 THAT CASE WERE OR WERE NOT SIDRO GANG MEMBERS. THERE'S A
21 QUESTION IN MY MIND IN THE BRIEF REVIEW OF THE FILE THAT I
22 MADE AS TO WHETHER OR NOT THE OTHER KIDS THAT WERE INVOLVED
23 IN THAT -- AND I'M NOT SURE AT THIS POINT WHO WAS CHARGED --
24 WHETHER OR NOT THEY WERE OR WERE NOT SIDRO GANG MEMBERS. SO
25 I JUST ASK THE COURT AT SOME POINT TO GIVE ME AN OPPORTUNITY
26 TO REQUEST THAT BEFORE WE GET INTO THAT QUESTION.

27 THE COURT: OKAY. AND THEN MAYBE TO SAVE SOME
28 TIME, WHEN THE GANG EXPERT WHO'S GOING TO TESTIFY COMES IN,

1 DO YOU WANT TO HAVE A DISCUSSION TO SEE IF THAT WOULD SAVE
2 TIME?

3 MR. LEAHY: VERY GOOD, YOUR HONOR.

4 THE COURT: OKAY.

5 MS. ROACH: AND, YOUR HONOR, ADDITIONALLY, I THINK
6 THE POLICE REPORTS INDICATE THAT ALL FOUR OF THE INDIVIDUALS
7 CLAIMED SIDRO GANG MEMBERSHIP AT THE TIME THE CRIME WAS
8 COMMITTED.

9 THE COURT: OKAY. ANYTHING ELSE BEFORE WE CALL IN
10 THE JURY?

11 MR. LEAHY: NO, YOUR HONOR.

12 THE COURT: OKAY.

13 (AT 10:41 A.M. THE PROSPECTIVE JURORS ENTERED THE
14 COURTROOM AND THE FOLLOWING PROCEEDINGS WERE HAD:)

15 GOOD MORNING, LADIES AND GENTLEMEN. MY NAME IS JUDGE
16 ESTEBAN HERNANDEZ. AND AT THIS TIME, I'M GOING TO HAVE THE
17 ATTORNEYS INTRODUCE THEMSELVES TO YOU.

18 MS. ROACH: GOOD MORNING. MY NAME IS SOPHIA ROACH.
19 I WORK FOR THE DISTRICT ATTORNEY'S OFFICE FOR THE COUNTY OF
20 SAN DIEGO.

21 MR. SANCHEZ: GOOD MORNING, LADIES AND GENTLEMEN.
22 MY NAME IS BENJAMIN SANCHEZ. I REPRESENT MR. JAVIER
23 RODRIGUEZ, WHO IS SEATED TO MY RIGHT.

24 MR. LEAHY: I'M JERRY LEAHY. I REPRESENT JOSE LUIS
25 LEON WHO IS IMMEDIATELY TO MY LEFT.

26 THE COURT: OKAY. THANK YOU. NOW, LADIES AND
27 GENTLEMEN, LET ME EXPLAIN A LITTLE BIT ABOUT HOW WE'RE GOING
28 TO BE PROCEEDING THIS MORNING. WE'RE GOING TO BE STARTING

1 AT HOME. OCCUPATION, RETIRED CLERGY. BUT I ALSO OWN MY OWN
2 BUSINESS, AND I'M STILL WORKING AT THAT.

3 THE COURT: AND WHAT KIND OF BUSINESS IS IT?

4 PROSPECTIVE JUROR JANICE KISHPAUGH: I SELL BOOKS
5 AND GAMES THAT PROMOTE POSITIVE VALUES. MY EX-SPOUSE IS ALSO
6 RETIRED CLERGY. I HAVE HAD A COUPLE OF PRIOR JURY
7 EXPERIENCES. NO ASSOCIATION WITH LAW ENFORCEMENT. NO
8 INVOLVEMENT IN ANY OF THE JUSTICE SYSTEMS. I'VE HAD SEVERAL
9 BREAK-INS IN OUR HOME. AND I SEE NO REASON WHY I CAN'T BE
10 IMPARTIAL.

11 THE COURT: THANK YOU.

12 NUMBER 15, [JUROR NO. 8].

13 JUROR NO. 8: MY NAME IS [JUROR NO. 8]. I'M A
14 RESIDENT OF BONITA. I'M MARRIED WITH TWO TEENAGE CHILDREN.
15 I'M EMPLOYED AS AN EDUCATIONAL PSYCHOLOGIST WITH THE CHULA
16 VISTA SCHOOL DISTRICT. MY SPOUSE IS AN ELEMENTARY SCHOOL
17 PRINCIPAL. I'VE HAD ONE PRIOR JURY EXPERIENCE OVER 10 YEARS
18 AGO IN SAN DIEGO. AND MY RESPONSES FROM 8 TO 11 ARE NO.

19 THE COURT: OKAY. THANK YOU.

20 NUMBER 16, MR. TOTH.

21 PROSPECTIVE JUROR MICHAEL TOTH: MICHAEL TOTH. I
22 LIVE IN CHULA VISTA. MARRIED. NO CHILDREN. I MANAGE THE
23 LENDING FUNCTION FOR A COMMERCIAL BANK. MY SPOUSE DOES
24 VOLUNTEER WORK. NO PRIOR JURY EXPERIENCE. NO ASSOCIATION
25 WITH LAW ENFORCEMENT. NO INVOLVEMENT IN CRIMINAL, MILITARY,
26 CUSTOMS, OR IMMIGRATION. I'VE BEEN A VICTIM OF -- I WAS
27 REAR-ENDED ON THE 805 BY AN UNINSURED MOTORIST, TOTALED MY
28 CAR, PUSHED ME INTO ANOTHER UNINSURED MOTORIST IN FRONT OF

GIOVANNI PALLAVICINI

BY MR. LEAHY:

Q. MR. PALLAVICINI?

A. YES.

Q. AM I CLOSE?

A. NO, BUT THAT'S ALL RIGHT.

Q. PLEASE PRONOUNCE YOUR NAME FOR ME.

A. PALLAVICINI.

Q. MY WIFE SPEAKS SOME ITALIAN, AND SHE WOULD DO A
MUCH BETTER JOB THAN I DO. IS THAT AN ITALIAN NAME?

A. YES, IT IS.

Q. OKAY. SO YOU'VE INDICATED THAT YOU HAVE SOME
PROBLEM -- THAT'S NOT THE RIGHT WAY TO PUT IT. YOU HAVE AN
AVERSION TO GANG MEMBERS. WOULD THAT BE A WAY TO
CHARACTERIZE IT?

A. YEAH, YOU CAN SAY THAT.

Q. WHEN YOU SEE PEOPLE ON THE STREET THAT YOU THINK
MIGHT BE ASSOCIATED WITH A GANG, YOU AVOID THOSE PEOPLE'S
CONTACT; IS THAT CORRECT?

A. YEAH.

Q. SIR, WHAT WE'RE LOOKING FOR IN THIS CASE IS, THERE
WILL BE EVIDENCE, WE BELIEVE, THAT WILL -- THE PROSECUTION
WILL TRY TO SHOW THAT THESE TWO YOUNG MEN ARE GANG MEMBERS.
YOU'LL HEAR THAT TESTIMONY, AND IT WILL BE UP TO YOU TO
DECIDE WHETHER THEY ARE OR ARE NOT GANG MEMBERS. DO YOU
UNDERSTAND THAT?

A. YEAH, I UNDERSTAND.

Q. NOW, SHE WILL PROBABLY HAVE A LAW ENFORCEMENT

1 CHULA VISTA, CALIFORNIA; AUGUST 7, 2003; 8:59 A.M.

2 THE COURT: LET'S GO AHEAD AND GO ON THE RECORD.

3 JUST A QUICK SCHEDULING ISSUE ON THE RECORD. ALL RIGHT.

4 CALLING THE CASE OF THE PEOPLE VERSUS JOSE LEON, AND JAVIER
5 RODRIGUEZ. COUNSEL IS PRESENT. DEFENDANTS ARE NOT PRESENT.
6 JURY IS NOT PRESENT. I WANT TO RECONFIRM ON OUR SCHEDULING.
7 CAN YOU REFRESH MY RECOLLECTION OF WHY WE'RE DARK ON MONDAY?

8 *Q*, MR. SANCHEZ: MONDAY I HAVE SOME MEDICAL
9 APPOINTMENTS.

10 THE COURT: OH, IT WAS THE MEDICAL APPOINTMENT.

11 MR. SANCHEZ: ON MONDAY, YES.

12 THE COURT: AND THOSE ARE STILL FIRM? THOSE CAN
13 NOT BE CHANGED?

14 MR. SANCHEZ: YEAH, I CAN'T CHANGE THOSE. NO, I
15 CAN'T CHANGE THEM.

16 THE COURT: OKAY. NOW, WITH REGARD TO TUESDAY THE
17 -- YOU HAVE --

18 MR. SANCHEZ: I HAVE --

19 *Q* THE COURT: -- INDICATED THAT YOU HAVE A LAWSUIT IN
20 LOS ANGELES WHERE YOU NEEDED TO BE THERE?

21 MR. SANCHEZ: WELL, I'VE ELECTED NOT TO GO.

22 THE COURT: OKAY.

23 MR. SANCHEZ: SO I'LL BE HERE.

24 *Q* THE COURT: AND YOU ARE NOT UNDER SUBPOENA IN THAT
25 CASE?

26 MR. SANCHEZ: I'M NOT UNDER SUBPOENA. I HAVE NO
27 ORDER. SO I'M GOING TO CONTACT MY LAWYER AND TELL HIM TO *?*
28 JUST PROCEED WITHOUT ME.

1 THE COURT: OKAY. I JUST WANT TO MAKE SURE THAT --

2 MR. SANCHEZ: I WILL GIVE THEM THE NUMBER OF THIS
3 COURT IN CASE THEY WANT TO CALL DOWN AND CONFIRM WHERE I'M
4 AT. BUT SINCE I'M NOT UNDER SUBPOENA, I DON'T SEE WHY I NEED
5 TO BE THERE.

6 THE COURT: OKAY. DO YOU WANT ME TO CALL THE JUDGE
7 AS A COURTESY JUST TO LET HIM KNOW THAT YOU'RE HERE, OR HOW
8 DO YOU -- DO YOU WANT ME TO DO ANYTHING IN THAT REGARD?

9 MR. SANCHEZ: JUST TO LET THEM KNOW THAT I'M HERE
10 IF THEY NEED ME.

11 THE COURT: OKAY. SO YOU --

12 [^] MR. SANCHEZ: BUT I WILL BE REPRESENTED BY AN
13 ATTORNEY.

14 THE COURT: SO YOU DO WANT ME TO CALL?

15 MR. SANCHEZ: I GUESS, YOU KNOW, THE COURT CALLING
16 WOULD ADD MORE CREDIBILITY AS OPPOSED TO HAVING MY LAWYER
17 TELL THEM. THEY NEVER BELIEVE LAWYERS ANYWAY.

18 THE COURT: ALL RIGHT. I'LL MAKE THAT CALL AND LET
19 HIM KNOW THAT YOU'RE IN TRIAL HERE.

20 MR. SANCHEZ: THANK YOU. I'D APPRECIATE IT. SO
21 I'LL BE READY TO GO ON -- I'LL BE AVAILABLE TUESDAY AND
22 WEDNESDAY.

23 THE COURT: AND THEN WITH REGARD TO THURSDAY?

24 MR. SANCHEZ: THURSDAY I HAVE TO BE IN EL CENTRO.
25 I CAN'T IMAGINE THIS GOING THAT FAR. ^{why?}

26 THE COURT: WELL, IN THE EVENT WE'RE STILL IN
27 TRIAL, THOUGH, I WOULD LIKE YOU TO BE HERE AVAILABLE TO GO.

28 MR. SANCHEZ: WELL, I THINK WE'D BE IN TRIAL

1 PLEASE STEP OUTSIDE.

2 MS. ROACH: YOUR HONOR, IF I COULD ASK THAT SHE BE
3 PLACED ON STANDBY SO THAT SHE DOESN'T HAVE TO WAIT IN THE
4 COURT.

5 THE COURT: YES. CALL HER BACK IN.

6 ALL RIGHT. MS. LIMON, I JUST WANTED TO LET YOU KNOW,
7 I'M PLACING YOU ON STANDBY BECAUSE WE'RE NOT SURE EXACTLY
8 WHEN, IF WE MAY NEED YOU, WHEN THAT MIGHT BE, OKAY? THANK
9 YOU.

*Nothing from
Sanchez!*

10
11 MARTIN HERRERA,
12 HAVING BEEN FIRST DULY ADMINISTERED AN OATH IN ACCORDANCE
13 WITH CODE OF CIVIL PROCEDURE SECTION 2094, WAS EXAMINED AND
14 TESTIFIED AS FOLLOWS:

15

16 THE CLERK: CAN YOU PLEASE STATE YOUR FULL NAME AND
17 SPELL YOUR LAST NAME FOR THE RECORD.

18 THE WITNESS: MARTIN HERRERA. IT'S H-E-R-R-E-R-A.

19 THE COURT: YOU MAY PROCEED.

20

DIRECT EXAMINATION

21 BY MS. ROACH:

22 Q. MR. HERRERA, ARE YOU RELATED TO LAURA LIMON?

23 A. YES, SHE'S MY WIFE.

24 Q. DO YOU HAVE ANY CHILDREN TOGETHER?

25 A. YES, MA'AM.

26 Q. BACK ON MAY 11TH OF 2003, WERE YOU WITH YOUR WIFE
27 AND YOUR SON AND YOUR BROTHER DRIVING BACK FROM MEXICO?

28 A. YES, WE WERE.

1 Q. AND WHERE WERE YOU DRIVING TO?

2 A. THE ADDRESS?

3 Q. WELL, WHOSE HOUSE WAS IT THAT YOU WERE DRIVING TO?

4 A. MY BROTHER.

5 Q. AND IS THAT NEAR THE 200 BLOCK OF QUINTARD STREET
6 IN CHULA VISTA?

7 A. YES, IT IS.

8 Q. DO YOU REMEMBER APPROXIMATELY WHAT TIME IN THE
9 MORNING YOU ARRIVED AT THE 200 BLOCK OF QUINTARD STREET?

10 ~~A.~~ A. LIKE 2:20 -- BETWEEN 2:30 AND 3 IN THE MORNING.

11 Q. SO, EARLY IN THE MORNING?

12 A. YEAH.

13 ~~Q.~~ Q. AND ONCE YOU GOT TO THE ADDRESS, DID YOU TRY TO
14 PARK THE VEHICLE THAT YOU WERE DRIVING?

15 ~~A.~~ A. YES.

16 Q. AND DID YOU PARK IN A PARKING STALL, OR DID YOU
17 PARK IT ON THE STREET OR IN THE LOT?

18 A. IT WAS IN A PARKING STALL.

19 Q. AND DID YOU NOTICE ANYTHING UNUSUAL AFTER PARKING
20 THE VEHICLE?

21 A. WELL, WHEN WE FIRST WENT IN THE PARKING LOT, THERE
22 WAS AN EXPLORER, AND IT HAD THE DOOR OPEN.

23 Q. DO YOU REMEMBER WHAT COLOR THE EXPLORER WAS?

24 A. I THINK IT WAS GREEN. IT WAS A DARK COLOR.

25 Q. AND WHEN YOU SAID THAT THE DOOR WAS OPEN, WHICH
26 DOOR WAS OPEN?

27 A. THE DRIVER'S DOOR.

28 Q. AND WAS THERE ANY LIGHT COMING FROM IN THE CAR?

1 ~~*~~ A. YEAH, THE LIGHT WAS -- THAT'S HOW I NOTICED THAT
2 THE DOOR WAS OPEN.

3 Q. WHAT HAPPENED NEXT?

4 A. SO WHEN WE PARKED MY TRUCK, I TURNED AROUND AND SAW
5 THESE -- THESE GUYS LIKE IN MY BROTHER'S TRUCK, AND THEY
6 WERE, LIKE, MESSING WITH IT, SO I TURNED AROUND AND TOLD MY
7 BROTHER, "HEY, SOMEBODY'S MESSING WITH YOUR TRUCK."

8 Q. NOW, WHEN YOU FIRST NOTICED THIS, DID YOU NOTICE
9 BECAUSE YOU SAW SOMETHING OR BECAUSE YOU HEARD SOMETHING?

10 A. I HEARD SOMETHING.

11 Q. WHAT EXACTLY DID YOU HEAR, IF YOU KNOW?

12 A. LIKE, THEY WERE TRYING TO PULL THE GRILL.

13 Q. WHAT PART OF THE TRUCK? WERE THEY ON THE FRONT OR
14 THE BACK?

15 A. IN THE FRONT.

16 Q. IS THERE SOME KIND OF SPECIAL GRILL ON THE FRONT OF
17 YOUR BROTHER'S TRUCK?

18 ~~*~~ A. NO, IT'S AN OLD BEAT UP TRUCK.

19 Q. WHEN YOU LOOKED OVER, COULD YOU SEE WHAT THE
20 INDIVIDUALS LOOKED LIKE?

21 ~~*~~ A. I SAW ONE, HE WAS LIKE -- HE WAS KIND OF DUCKING.

22 Q. AND THE PERSON THAT WAS DUCKING, DID YOU SEE
23 ANYTHING ABOUT THEIR APPEARANCE?

24 A. YEAH, IT WAS A SHORT ONE.

25 ~~*~~ Q. AND DID THAT PERSON HAVE HAIR?

26 ~~*~~ A. NO.

27 Q. WHAT WERE THEY WEARING, IF YOU KNOW?

28 ~~*~~ A. NO, I DON'T KNOW WHAT THEY WERE WEARING. THEY WERE

1 LIKE DARK CLOTHES.

2 Q. DID THEY HAVE ON DIFFERENT CLOTHES BETWEEN THE TWO
3 OF THEM, OR DID THEY LOOK LIKE THEY WERE DRESSED THE SAME?

4 MR. LEAHY: YOUR HONOR, THIS MISSTATES THE
5 EVIDENCE. I THINK HE STATED HE ONLY SAW ONE PERSON.

6 THE COURT: OVERRULED. YOU MAY ANSWER.

7 THE WITNESS: WHAT WAS THE QUESTION? CAN YOU
8 REPEAT IT, PLEASE?

9 BY MS. ROACH:

10 Q. DO YOU RECALL WHETHER THEY WERE DRESSED SIMILARLY
11 OR DIFFERENTLY?

12 A. WELL, THEY WERE DRESSED, LIKE, YOU KNOW, NORMAL.
13 HOW CAN I SAY IT? YOU KNOW, NOT -- THEY WERE NOT REAL
14 DRESSED.

15 Q. WHAT I'M ASKING YOU IS, DID IT LOOK LIKE THEY WERE
16 WEARING THE SAME COLOR CLOTHING, OR DID ONE OF THEM HAVE ON A
17 DIFFERENT COLOR CLOTHING THAN THE OTHER?

18 ~~X~~ A. WELL, YEAH, ONE HAD DIFFERENT CLOTHES. IT WAS
19 LIKE, I THINK, ONE WAS LIGHTER, AND THE OTHER ONE WAS DARK.

20 Q. NOW, THE ONE WITH THE LIGHTER CLOTHES, WAS HE THE
21 TALL ONE OR THE SHORT ONE?

22 A. THE TALL ONE.

23 Q. AND DID YOU NOTICE ANYTHING ABOUT THE TALL ONE,
24 WHETHER OR NOT HE HAD ANY HAIR?

25 A. NO.

26 Q. YOU DIDN'T NOTICE, OR HE DIDN'T HAVE ANY HAIR? I'M
27 SORRY.

28 A. HE DIDN'T HAVE ANY HAIR.

1 ~~X~~ Q. NOW, AFTER YOU SAW THEM NEAR THE FRONT GRILL OF
2 YOUR BROTHER'S TRUCK, WHAT DID YOU DO?

3 A. WELL, I TOLD MY WIFE TO TAKE MY KID INSIDE BECAUSE
4 I SAW HIM THERE. AND ONE HAD LIKE A CROWBAR OR SOMETHING.

5 Q. DID YOU SEE THAT IN HIS HANDS?

6 ~~X~~ A. WELL, HE DROPPED IT, AND I HEARD IT WHEN HE DROPPED
7 IT.

8 Q. WAS THAT THE TALL ONE OR THE SHORT ONE THAT HAD THE
9 CROWBAR?

10 A. THE TALL ONE.

11 Q. AND WERE THEY ABLE TO SEE YOU? IN OTHER WORDS, DID
12 YOU MAKE EYE CONTACT WITH THEM?

13 ~~X~~ A. YEAH, WE DID.

14 Q. AFTER YOU ASKED YOUR WIFE TO GO INSIDE, DO YOU KNOW
15 WHETHER OR NOT SHE STAYED IN THE PARKING LOT, OR DID YOU SEE
16 HER GO INSIDE?

17 A. NO, SHE JUST WALKED ALL THE WAY IN BECAUSE I TOLD
18 HER TO CALL 911.

19 Q. AND AS FAR AS YOU KNOW, SHE LEFT THE PARKING LOT?

20 A. EXACTLY.

21 Q. NOW, AFTER YOUR WIFE LEFT THE PARKING LOT AND YOU
22 HEARD THE CROWBAR DROP, WHAT DID YOU SEE HAPPEN NEXT?

23 ~~X~~ A. WELL, I WALKED BEHIND MY WIFE ALL THE WAY IN, AND
24 WHEN I HEARD THE CROWBAR, I TURNED AROUND, AND THEY WERE
25 RIGHT THERE BREAKING INTO THE CAR.

26 Q. WHEN YOU SAID, "BREAKING IN THE CAR," JUST NOW, YOU
27 MADE KIND OF A MOTION WITH YOUR ARM BENT AT THE ELBOW AND
28 MOVING BACK. CAN YOU TELL US EXACTLY WHAT YOU SAW THEM DO TO

1 BREAK INTO THE CAR?

2 A. WELL, I SAW THE TALL ONE WHEN HE BROKE THE WINDOW
3 OF THE JETTA OF THE CAR, AND THAT'S HE BROKE IT, LIKE, WITH
4 HIS ELBOW OR SOMETHING, AND THAT'S THE ONLY THING I SAW WHEN
5 I TURNED AWAY, BECAUSE I CONTINUED WALKING. I JUST TURNED
6 AROUND AND SAW HIM WHEN HE BROKE IT.

7 Q. COULD YOU HEAR THE WINDOW BREAKING?

8 A. YEAH.

9 Q. WHAT DID YOU SEE HAPPENED AFTER THE WINDOW WAS
10 BROKEN?

11 A. HE WAS INSIDE THE CAR. HE WAS TRYING TO READ
12 SOMETHING. I DON'T KNOW WHAT HE WAS DOING.

13 Q. NOW, DID YOU RECOGNIZE THE VEHICLE THAT HE WAS
14 BREAKING INTO AT ALL?

15 A. YEAH.

16 Q. AND HOW DID YOU RECOGNIZE IT?

17 A. WELL, THE OWNER OF THE CAR, SHE LIVES LIKE ON TOP
18 OF US, LIKE ACROSS IN THE OTHER APARTMENTS, SO WE KNEW IT WAS
19 HER CAR.

20 Q. ALL RIGHT. NOW, DO YOU RECALL WHETHER OR NOT THERE
21 WAS ANY LIGHTS ON THE PARKING LOT?

22 A. WHAT DO YOU MEAN? WHAT KIND OF LIGHTS?

23 Q. LIKE STREETLIGHTS OR OVERHEAD LIGHTS?

24 A. YEAH. WELL, THERE'S LIGHTS.

25 Q. OKAY. DID YOU HAVE ANY PROBLEMS SEEING EITHER OF
26 THE TWO PEOPLE THAT YOU SAW AROUND YOUR BROTHER'S CAR AND
27 AROUND THE JETTA?

28 A. NO, I WAS RIGHT THERE, LIKE FROM WHERE YOU'RE --

1 WHERE YOU'RE AT. THAT'S WHERE THEY'RE AT.

2 Q. LIKE FROM YOU TO ME RIGHT NOW?

3 A. YEAH.

4 MS. ROACH: YOUR HONOR, CAN YOU GIVE US AN ESTIMATE
5 ON THE DISTANCE?

6 * THE COURT: RECORD WILL REFLECT APPROXIMATELY --
7 LET'S SEE -- 22 FEET FROM THE WITNESS STAND TO THE BAR, AND
8 SO YOU'RE ABOUT 2 FEET. SO ABOUT 20 FEET.

9 MS. ROACH: ABOUT 20 FEET. OKAY.
10 BY MS. ROACH:

11 Q. NOW, AT THIS POINT, WHAT WAS YOUR BROTHER DOING?

12 A. WELL, I WALKED INSIDE BECAUSE 911, THEY DIDN'T WANT
13 TO RESPOND, AND THEY WERE LIKE, "WELL, WHAT'S YOUR NAME," AND
14 THIS AND THAT, AND I WAS LIKE, "YOU KNOW WHAT? WE NEED HELP.
15 WE HAVE THESE CRIMINALS OVER HERE, BECAUSE THEY'RE ALL
16 * STUMBLING AROUND, AND THEY'RE ON SOMETHING." SO THAT'S WHEN
17 I GOT SCARED. SO I WENT WITH MY KID, TOOK HIM IN. I DON'T
18 KNOW WHAT MY BROTHER WAS DOING. I DON'T KNOW. HE STAYED
19 OUTSIDE LOOKING AT THEM.

20 Q. SO DID YOU LEAVE THE APARTMENT DOOR OPEN OR SHUT
21 WHEN YOU WENT INSIDE?

22 * A. WELL, AT THE TIME WE LEFT IT OPEN, BUT, THEN, WHEN
23 I THINK, LIKE, WHEN MY BROTHER CAME BACK, BECAUSE I YELLED AT
24 THEM, BECAUSE WHEN THEY BROKE THE WINDOW I YELLED AT THEM,
25 "I'M GOING TO CALL THE POLICE. YOU GUYS BETTER LEAVE." SO
26 AT THAT TIME, WE WERE ALREADY IN FRONT OF THE DOOR OF THE
27 APARTMENT.

28 Q. WHEN YOU SAY, "WE," YOU MEAN YOU, YOUR WIFE, AND

1 YOUR SON?

2 ~~Q~~ A. EXACTLY. AND MY BROTHER.

3 Q. AND YOUR BROTHER. NOW, ONCE THAT HAPPENED, WHAT
4 DID YOU DO ONCE YOU SAID THAT YOU WERE GOING TO CALL THE
5 COPS?

6 A. WE WENT INSIDE, BECAUSE HE PULLED OUT A GUN.

7 Q. I'M SORRY. YOU WERE, OR YOU WERE NOT? DID YOU SAY
8 YOU WERE INSIDE OR YOU WERE NOT?

9 A. WE WERE GOING INSIDE RIGHT THERE.

10 Q. OKAY. AND WHEN YOU SAID THAT THEY PULLED OUT A
11 GUN, DID YOU SEE THEM PULL OUT A GUN?

12 ~~A~~ A. NO, I DIDN'T. I ONLY HEARD THE SHOT.

13 Q. WHEN YOU SAY YOU HEARD THE SHOT, WERE YOU CERTAIN
14 AT THAT TIME THAT THAT WAS A GUNSHOT?

15 A. YEAH.

16 Q. DO YOU HAVE EXPERIENCE IN FIRING GUNS?

17 ~~A~~ A. NO, BUT WHEN I TURNED AROUND, I DIDN'T SEE THE
18 GUNSHOT. I SAW THE FIRE COME UP, SO I THOUGHT IT WAS A GUN.

19 Q. WHEN YOU SAY YOU SAW THE FIRE COME OUT, TELL ME
20 EXACTLY -- WELL, FIRST OF ALL, IN THE LOCATION OF WHERE THE
21 FIRE WAS COMING FROM, WAS THAT IN THE LOCATION OF THE SHORT
22 ONE OR THE TALL ONE?

23 A. IT WAS IN THE TALL ONES -- IT WAS IN THE LOCATION
24 OF THE SHORT ONE.

25 Q. OKAY. AND --

26 A. AND THE TALL ONE WAS IN FRONT OF HIM. SO THEY WERE
27 NOT LIKE -- HE WAS IN THE BACK, AND HE WAS, LIKE, WALKING
28 TOGETHER IN FRONT OF THE TALL ONE WAS, LIKE, WALKING TO THE

1 CAR, AND THE SHORT ONE WAS IN THE BACK.

2 Q. AND WHEN YOU SAW THIS, I MEAN, WHAT WAS IT -- WAS
3 IT A FIRE, OR WAS IT A FLASH, WAS IT JUST A LIGHT? WHAT
4 EXACTLY DID YOU SEE?

5 ~~A.~~ IT WAS LIKE A LIGHT.

6 Q. DID YOU SEE WHAT PART OF THE SHORT ONE'S BODY THAT
7 LIGHT WAS COMING FROM?

8 A. NO, IT WAS UP IN THE AIR.

9 Q. UP IN THE AIR?

10 A. YEAH.

11 Q. AND DID IT LOOK LIKE THE SHORT ONE WAS REACHING
12 OVER HIS HEAD? YOU'VE MADE KIND OF A MOTION THAT THERE WAS
13 REACHING OVER THE HEAD?

14 A. NO, I ONLY SAW, LIKE, THE FIRE COME OUT A LITTLE
15 BIT. I DON'T KNOW WHAT IT WAS LIKE A LIGHT OR SOMETHING, BUT
16 I DON'T REMEMBER EXACTLY HOW HE HAD HIS HANDS. ALL THE WAY
17 UP OR NO.

18 Q. BUT DID IT APPEAR THAT HIS HAND WAS RAISED?

19 A. WELL, YEAH.

20 Q. AND FOR THE RECORD, WHEN YOU WERE DESCRIBING THAT,
21 YOU HAD YOUR ARM BENT AT THE ELBOW AND THEN YOU WERE RAISING
22 IT IN VARIOUS HEIGHTS UP ABOVE YOUR HEAD, CORRECT?

23 ~~A.~~ WELL, IT'S KIND OF HARD TO SEE IT, SO I COULDN'T
24 SEE EXACTLY HOW HE HAD HIS HAND. AND THEN IT HAPPENED SO
25 QUICK. I WAS ALL EXCITED. SO I DON'T KNOW EXACTLY HOW HE
26 HAD IT.

27 Q. SO ONCE YOU HEARD THE GUNSHOT, AND YOU SAW THE
28 LIGHT, DID YOU GO INSIDE THE APARTMENT?

1 CHULA VISTA, CALIFORNIA; THURSDAY, AUGUST 7, 2003; 1:32 P.M.

2 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT
3 OUT OF THE PRESENCE OF THE JURORS:)

4 THE COURT: THE RECORD WILL REFLECT COUNSEL IS
5 PRESENT, DEFENDANTS ARE PRESENT, THE JURY IS NOT PRESENT. WE
6 HAVE A NOTE HERE FROM ~~JUROR NUMBER 7~~. IT READS: "I HAVE
7 SOME CONCERNS REGARDING THE DEFENDANTS. THEY LOOK FAMILIAR.
8 AT FIRST SIGHT, I THOUGHT I MIGHT HAVE SEEN THEM ON
9 TELEVISION, PARENTHESIS, NEWS. THE MORE I LOOK AT THEM, I
10 THINK IT MIGHT BE SOMEWHERE ELSE, AND THIS CONCERNS ME.
11 COULD IT BE POSSIBLE FOR ME TO BE EXCUSED? [JUROR NO. 7]."

12 I THINK WE SHOULD PROBABLY INQUIRE.

13 MR. LEAHY: WE SHOULD PROBABLY TALK TO HER.

14 THE COURT: LET'S BRING HER IN BY HERSELF.

15 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT
16 IN THE PRESENCE OF JUROR NO. 7:)

17 THE COURT: ALL RIGHT. THE RECORD WILL REFLECT
18 JUROR NUMBER 7 IS PRESENT. AND WE HAVE RECEIVED YOUR NOTE
19 CONCERNING THE FACT THAT YOU THINK THAT THE DEFENDANTS LOOK
20 FAMILIAR. AND I NEED TO INQUIRE A LITTLE BIT MORE ABOUT
21 THIS. AND THE RECORD WILL REFLECT THE JURY IS NOT PRESENT,
22 COUNSEL AND THE DEFENDANTS ARE PRESENT.

23 YOU MAY PROCEED.

24 JUROR NO. 7: I WAS JUST GOING TO SAY, AT FIRST
25 WHEN -- UPON FIRST SIGHT, LIKE I SAID, I THOUGHT THERE WAS
26 SOME KIND OF FAMILIARITY, AND I THOUGHT MAYBE IT COULD HAVE
27 BEEN FROM THE NEWS. I DON'T KNOW. I'M THINKING IT MIGHT NOT
28 BE. I DON'T KNOW IF IT COULD BE. I DON'T KNOW THEM, FIRST

1 OF ALL. BUT THERE'S JUST, YOU KNOW, THEY LOOK FAMILIAR. I
2 DON'T KNOW WHERE FROM. I COULDN'T TELL YOU. I COULDN'T TELL
3 YOU IF IT WAS, YOU KNOW, FROM THE RESTAURANT DOWN THE STREET.
4 I COULDN'T TELL YOU WHERE. BUT IT MAKES ME UNCOMFORTABLE
5 KNOWING THIS. I CAN'T GIVE YOU ANY SPECIFICS. ALL I CAN SAY
6 IS I'M JUST NOT COMFORTABLE WITH IT. I DON'T KNOW WHY, YOU
7 KNOW.

8 THE COURT: WELL, LET ME ASK YOU THIS, THE FACT
9 THAT THEY LOOK FAMILIAR AND YOU'RE NOT SURE WHERE, THAT DOES
10 NOT CAUSE YOU TO PREJUDGE THE CASE, DOES IT?

11 JUROR NO. 7: NO. NO, I'M JUST -- I'M JUST NOT
12 COMFORTABLE WITH THAT, YOU KNOW. MY INSTINCTS SAY SOMETHING
13 JUST DOESN'T FEEL RIGHT.

14 THE COURT: OKAY. NOW, THE FACT THAT YOU MAY OR
15 MAY NOT HAVE SEEN THEM IN THE PAST, DOES THAT AFFECT YOUR
16 ABILITY TO LOOK AT THE EVIDENCE AND MAKE A DETERMINATION
17 BASED SIMPLY ON EVIDENCE THAT COMES IN?

18 JUROR NO. 7: JUST LOOKING, NO, OF COURSE. I MEAN,
19 I KNOW WHAT YOU'RE --

Interrupted

20 THE COURT: AND THEN ~~WOULD~~ YOU BE ABLE TO APPLY THE
21 LAW THAT I GIVE YOU, FACTS, AND FIND THEM BASED STRICTLY ON
22 THE EVIDENCE?

23 JUROR NO. 7: YOUR WORDS, OF COURSE, MAKE PERFECT
24 SENSE, AND OF COURSE I CAN DO THAT. LIKE I SAID, INTERNALLY,
25 I'M JUST NOT -- I DON'T KNOW. I JUST DON'T FEEL COMFORTABLE.

26 THE COURT: OKAY. BUT SINCE YOU'RE NOT SURE FROM
27 WHAT CONTEXT, SENSING THAT THERE'S SOMETHING MORE, IS THERE A
28 FEAR, OR IS THERE SOME OTHER CONCERN?

1 JUROR NO. 7: SURE, I GUESS IT COULD BE. LIKE I
2 SAID, I DON'T KNOW THEM OR ANYTHING LIKE THAT. BUT, YOU
3 KNOW, I GUESS MY FEAR WOULD BE, EASILY PUT, WOULD BE FEAR OF
4 RETALIATION ONE WAY OR ANOTHER.

5 THE COURT: OKAY. NOW, ONE THING I DID NOT MENTION
6 AT THE BEGINNING, AND WHICH I COULD -- WELL, LET ME DISCUSS
7 WITH THE ATTORNEYS. BUT IT -- WELL, LET ME JUST SPEAK WITH
8 THE ATTORNEYS FOR A MOMENT WITHOUT THE REPORTER.

9 (SIDEBAR CONFERENCE HELD; NOT REPORTED.)

10 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT
11 IN THE PRESENCE OF JUROR NO. 7:)

12 THE COURT: THE RECORD WILL REFLECT WE'RE BACK IN
13 THE COURTROOM. COUNSEL ARE PRESENT, DEFENDANTS ARE PRESENT,
14 AND JUROR NUMBER 7 IS PRESENT. AT THIS TIME, LET ME JUST
15 HAVE THE ATTORNEYS ASK SOME MORE QUESTIONS OF YOU.

16 MR. LEAHY.

17 BY MR. LEAHY:

18 Q. HI.

19 A. HI.

20 Q. YOU USED THE WORD "RETALIATION" A MOMENT AGO. DO
21 YOU REMEMBER THAT? DO YOU REMEMBER USING THE WORD
22 "RETALIATION"?

23 A. YES.

24 Q. THAT SUGGESTS TO ME THAT BECAUSE THERE'S SOME GANG
25 OVERTONES IN THIS CASE, THAT YOU FEEL PERHAPS SOME FEAR ABOUT
26 YOUR INVOLVEMENT IN THE TRIAL; IS THAT CORRECT?

27 A. YES.

28 Q. I GUESS THE REAL QUESTION THAT WE NEED TO KNOW IS,

1 DO YOU THINK THAT YOU CAN SET THAT FEAR ASIDE AS YOU CONSIDER
2 THE EVIDENCE IN THIS CASE?

3 A. I MEAN, ACADEMICALLY, OF COURSE, YES, I CAN. BUT
4 LIKE I SAID, IT JUST -- SOMETHING JUST WASN'T SITTING WELL WE
5 ME. AND I THOUGHT, YOU KNOW, I SHOULD SAY SOMETHING.

6 Q. TO THE BEST OF MY KNOWLEDGE, THESE MEN HAVE NEVER
7 BEEN ON TELEVISION. SO I DON'T THINK YOU WOULD HAVE SEEN
8 THEM BECAUSE OF THAT. CERTAINLY THIS CASE DID NOT GET ANY
9 PUBLICITY.

10 DO YOU THINK THAT YOUR FEELINGS WOULD INFLUENCE HOW YOU
11 DECIDED THE ISSUES IN THIS CASE? DO YOU THINK IT WOULD MAKE
12 YOU MORE PRONE TO FIND THESE YOUNG MEN GUILTY, OR MORE PRONE
13 TO FIND THEM NOT GUILTY?

14 A. NO, I CAN FOLLOW THOSE INSTRUCTIONS. I CAN DO
15 THAT, YOU KNOW, PUTTING LIKE -- I CAN SEPARATE MY EMOTIONS
16 FROM THAT. BUT LIKE I SAID, SOMETHING JUST WASN'T SITTING
17 WELL WE ME. AND I THOUGHT SINCE IT WAS MY CONCERN THAT I
18 SHOULD SPEAK UP BEFORE, YOU KNOW, I WENT ANY FURTHER. THAT'S
19 ALL.

20 Q. WE CERTAINLY APPRECIATE THAT. BUT I THINK YOU CAN
21 UNDERSTAND OUR CONCERN, IS THAT WE NEED TO KNOW THAT YOU CAN
22 LISTEN FAIRLY AND OBJECTIVELY TO THE EVIDENCE, AND WHEN YOU
23 GO BACK INTO THE JURY ROOM, YOU CAN LEAVE ASIDE THOSE
24 FEELINGS, PRESUME THAT THESE GENTLEMEN ARE NOT GUILTY, AND
25 JUST LOOK AT THE EVIDENCE, AND SEE IF THE EVIDENCE CONVINCES
26 YOU OF THEIR GUILT. DO YOU THINK YOU CAN DO THAT?

27 A. YES, I CAN. YOU KNOW, I WAS SITTING HERE, AND I'M
28 THINKING, "OKAY. OF COURSE," LIKE I SAID, "I DON'T KNOW

1 THESE GENTLEMEN." I'M THINKING, "YEAH, THEY COULD BE
2 INNOCENT, I DON'T KNOW. THEY COULD BE GUILTY, I DON'T KNOW."
3 I DON'T KNOW WHAT THE OUTCOME IS GOING TO BE. I JUST HAVE
4 THAT FEELING. AND LIKE I SAID, I THOUGHT SINCE I WASN'T
5 FEELING COMFORTABLE WITH IT, LIKE I SAID, I SHOULD SPEAK UP.

6 MR. LEAHY: I APPRECIATE THAT. THANK YOU VERY
7 MUCH.

8 THE COURT: THANK YOU.

9 MR. SANCHEZ, ANY QUESTIONS?

10 MR. SANCHEZ: NO, YOUR HONOR. NO, THANK YOU.

11 THE COURT: MS. ROACH, ANY QUESTIONS?

12 MS. ROACH: NO, YOUR HONOR.

13 THE COURT: OKAY. AND LET ME JUST INDICATE THAT
14 WHEN THE JURORS RETURN BACK INTO THE COURTROOM, I'M GOING TO
15 BE GIVING ALL THE JURORS AN ADMONISHMENT THAT YOUR NAME AND
16 ALL YOUR PERSONAL INFORMATION WILL BE SEALED PENDING FURTHER
17 COURT ORDER. AND THAT IF THERE IS A REQUEST BY ANY ATTORNEY
18 FOR ANY PERSONAL INFORMATION, THAT WOULD COME TO THE COURT,
19 AND WITH NOTIFICATION TO YOU IN ADVANCE PRIOR TO ANYTHING
20 BEING GIVEN OUT. DOES THAT MAKE YOU FEEL MORE AT EASE?

21 JUROR NO. 7: IT DOES.

22 THE COURT: OKAY. ALL RIGHT. OKAY. WELL, THANK
23 YOU VERY MUCH. AND AT THIS TIME, IF YOU'LL JUST STEP OUTSIDE
24 FOR A MOMENT.

25 JUROR NO. 7: OKAY. SORRY FOR THE INCONVENIENCE.

26 MR. SANCHEZ: NO PROBLEM.

27 (WHEREUPON JUROR NO. 7 EXITED THE COURTROOM AND THE
28 FOLLOWING PROCEEDINGS WERE HELD:)

Misleading?
Proper reiteration
of 100.

1 THE COURT: ALL RIGHT. THE RECORD WILL REFLECT
2 THAT JUROR NO. 7 HAS LEFT THE ROOM. COUNSEL ARE PRESENT,
3 DEFENDANTS ARE PRESENT. AND MR. LEAHY.

4 MR. LEAHY: YOUR HONOR, I JUST WOULD LIKE TO ASK
5 THE COURT TO EXCUSE HER BASED ON THE INFORMATION THAT WE
6 HAVE.

7 MR. SANCHEZ: JOIN IN THE MOTION, YOUR HONOR.

8 THE COURT: MS. ROACH?

9 MS. ROACH: I'LL STIPULATE TO THE COURT.

10 THE COURT: BASED ON JUROR NUMBER 7'S COMMENTS, I
11 THINK SHE WAS JUST BEING CAREFUL, AND IN AN ABUNDANCE OF
12 CAUTION BECAUSE OF THE POSSIBILITY THAT SHE MAY HAVE SEEN
13 THEM IN THE PAST, SHE DOES EXPRESS CONCERN, AND SHE DID USE
14 THE WORD "RETALIATION" AT SOME POINT. AND I THINK THE FACT
15 THAT THAT CAME AFTER LISTENING TO THE WITNESS, HERRERA'S
16 TESTIMONY, WHEREIN HE EXPRESSES SOME FEAR OF RETALIATION, MAY
17 HAVE PUT THAT THOUGHT IN HER MIND, BECAUSE CERTAINLY SHE DID
18 NOT COME FORWARD EARLIER ABOUT RECOGNIZING ANYBODY OR
19 ANYTHING OF THAT NATURE. AND I THINK THAT THAT'S PROBABLY
20 SOMETHING, OR IN TERMS OF WHAT HAS CAUSED HER TO COME FORWARD
21 AND MAKE THE STATEMENTS. BUT IT IS CLEAR FROM THE QUESTIONS,
22 THAT SHE WILL BE ABLE TO LISTEN TO THE EVIDENCE AND MAKE HER
23 DECISION SIMPLY ON THE EVIDENCE AND THE LAWS AS I INSTRUCT
24 HER. AND, THEREFORE, THE REQUEST TO HAVE HER REMOVED AT THIS
25 TIME WILL BE DENIED.

26 AND WHAT I WILL DO IS, I WILL JUST MAKE A GENERAL
27 ADMONITION TO THE JURY WHEN THEY RETURN INTO THE COURTROOM
28 THAT ALL OF THEIR INFORMATION, INCLUDING THEIR NAMES, WILL BE

*Trilateral
Agreement!*

1 SEALED PENDING FURTHER COURT ORDER, AND WE WILL SIMPLY REFER
2 TO THEM BY THEIR SEAT NUMBER FROM NOW ON. AND IF THERE -- IF
3 ANYBODY HAS ANY KIND OF CONCERN, I THINK THAT WILL HELP THEM.

4 OKAY. SO AT THIS TIME, WE'LL CALL IN THE JURY. AND
5 THIS NOTE WILL BE COURT'S EXHIBIT 3.

6 (WHEREUPON THE JURY ENTERED THE COURTROOM AND THE
7 FOLLOWING PROCEEDINGS WERE HAD:)

8 THE COURT: OKAY. LET ME HAVE JUST A MOMENT WITH
9 COUNSEL AND THE REPORTER.

10 (WHEREUPON THE FOLLOWING PROCEEDINGS WERE HELD IN
11 CHAMBERS OUT OF THE PRESENCE OF THE JURY:)

12 THE COURT: THE RECORD WILL REFLECT COUNSEL AND I
13 ARE PRESENT OUTSIDE THE PRESENCE OF THE JURY.

14 I HAVE RECEIVED YET ANOTHER LETTER, AND THIS ONE IS
15 TYPED: "DEAR JUDGE HERNANDEZ, AFTER HEARING OPENING
16 STATEMENTS THIS MORNING, I FEEL THERE IS INFORMATION I NEED
17 TO PROVIDE YOU. AS I STATED ON TUESDAY, AUGUST 5TH, DURING
18 JURY SELECTION, I PRESENTLY WORK AS A SCHOOL COUNSELOR IN
19 NATIONAL CITY. BUT WITHIN THE NEXT TWO WEEKS, I PLAN TO BE
20 TAKING A COUNSELING POSITION AT SAN YSIDRO ADULT SCHOOL. I
21 TELL YOU THIS BECAUSE IT WAS BROUGHT UP IN COURT THAT THE
22 SUSPECTS IN THE CASE COULD BE AFFILIATED WITH THE, QUOTE,
23 SIDRO, END QUOTE, GANG.

24 THE COUNSELING POSITION AT SAN YSIDRO ADULT SCHOOL
25 INVOLVES COMMUNITY OUTREACH, ALONG WITH BEING THE POINT OF
26 CONTACT WITH EDUCATIONAL AND VOCATIONAL OPPORTUNITIES AT THE
27 SCHOOL SITE FOR STUDENTS 17 YEARS OF AGE AND OLDER. WORK
28 HOURS ARE MORNINGS, AFTERNOONS, AND EVENINGS, ALONG WITH AN

1 ADDITIONAL SATURDAY.

2 SUFFICE IT TO SAY, THERE IS CONTINUAL PUBLIC CONTACT.
3 FOR THE MOST PART, INDIVIDUALS ARE NOT TURNED AWAY FROM
4 ENROLLING IN CLASSES AT THE SCHOOL. BASICALLY, WE TRY TO
5 HELP ANYONE WHO WALKS IN THE DOOR ASKING FOR INFORMATION OR
6 ASSISTANCE. GIVEN THIS POSITION, IT IS LIKELY I WILL HAVE
7 CONTACT WITH PEOPLE WHO KNOW OF OR ARE INVOLVED WITH THE,
8 QUOTE, SIDRO, END QUOTE, GANG, OR MAY BE FAMILIAR WITH THIS
9 CASE. IT IS ALSO POSSIBLE I COULD HAVE CONTACT WITH THE
10 SUSPECTS THEMSELVES AT SOME POINT, AND/OR THEIRSELVES OR
11 FRIENDS. THERE MAY HAVE BEEN PEOPLE IN THE COURTROOM THIS
12 MORNING WHO PRESENTLY ARE STUDENTS AT THE SCHOOL WHO I AM NOT
13 AWARE OF.

14 THESE POSSIBILITIES, QUITE FRANKLY, ARE BOTHERSOME FOR
15 ME. I CANNOT GUARANTEE THAT MY DECISION IN THIS CASE WILL
16 NOT BE INFLUENCED BY THE POTENTIAL OF CONTACT WITH
17 INDIVIDUALS INVOLVED WITH THIS CASE AT SOME TIME IN THE
18 FUTURE. THEREFORE, I ASK YOU CONSIDER TO ALLOW ME BE REMOVED
19 FROM THIS CASE.

20 SINCERELY [JUROR NO. 10], JUROR NUMBER 10."

21 SO YET AGAIN WE HAVE ANOTHER JUROR COMING FORWARD WITH
22 SOME FEAR OF RETALIATION.

23 MS. ROACH: I'M NOT SURE IF IT'S FEAR OF
24 RETALIATION OR SIMPLY THAT HE'D BE AFFECTED IN SOME WAY OF
25 KNOWING THE PEOPLE.

26 THE COURT: HE SAYS "INFLUENCED AT SOME POINT IN
27 THE FUTURE."

28 MR. SANCHEZ: I'M ALSO CONCERNED THAT THESE JURORS

1 ARE TALKING TO ONE ANOTHER REGARDING THIS ISSUE OF
2 RETALIATION.

3 THE COURT: WELL, I WILL AGAIN ADMONISH THEM THAT
4 THEY CANNOT BE TALKING WITH ANYONE, INCLUDING FELLOW JURORS,
5 ABOUT ANYTHING REGARDING THE CASE.

6 WHAT I SUGGEST WE DO IS WE ASK THIS INDIVIDUAL
7 SEPARATELY ABOUT THE EXTENT OF THAT CONCERN.

8 MS. ROACH: THE OTHER THING IS THAT HE'S NOT GOING
9 TO BE STARTING THIS JOB FOR THE NEXT TWO WEEKS. WE MAYBE WE
10 CAN EVEN DO AN ORDER WHERE HE IS NOT TO GO TO THE JOB UNTIL
11 HE'S COMPLETED HIS DELIBERATIONS.

12 MR. LEAHY: WELL, I'M THINKING THAT WAS NOT WHAT
13 HE'S CONCERNED ABOUT. HE'S CONCERNED ABOUT THE FUTURE.

14 THE COURT: RIGHT.

15 MR. SANCHEZ: WHEN HE DOES GO TO WORK.

16 THE COURT: HIS CONCERN IS ABOUT ONCE HE'S AT THE
17 WORK SITE.

18 MS. ROACH: SO I GUESS THAT IS A FEAR OF
19 RETALIATION. I DON'T KNOW WHAT ELSE IT COULD BE.

20 THE COURT: WELL, AT THIS POINT, LET'S DO THIS.
21 WE'LL ASK JUROR NUMBER 10 TO REMAIN, ASK THE OTHERS TO STEP
22 OUT WHILE WE JUST GO OVER IT.

23 MR. SANCHEZ: YOU WANT TO BRING HIM BACK HERE, OR
24 YOU WANT TO TELL EVERYBODY TO LEAVE?

25 THE COURT: WELL, LET'S BRING JUROR NUMBER 10 BACK.
26 THAT WILL PROBABLY BE BEST.

27 (THE FOLLOWING PROCEEDINGS WERE HELD IN CHAMBERS IN
28 THE PRESENCE OF JUROR NO. 10:)

1 CHULA VISTA, CALIFORNIA; THURSDAY, AUGUST 7, 2003; 1:32 P.M.

2 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT
3 OUT OF THE PRESENCE OF THE JURORS:)

4 THE COURT: THE RECORD WILL REFLECT COUNSEL IS
5 PRESENT, DEFENDANTS ARE PRESENT, THE JURY IS NOT PRESENT. WE
6 HAVE A NOTE HERE FROM ~~JUROR NUMBER 7~~. IT READS: "I HAVE
7 SOME CONCERNS REGARDING THE DEFENDANTS. THEY LOOK FAMILIAR.
8 AT FIRST SIGHT, I THOUGHT I MIGHT HAVE SEEN THEM ON
9 TELEVISION, PARENTHESIS, NEWS. THE MORE I LOOK AT THEM, I
10 THINK IT MIGHT BE SOMEWHERE ELSE, AND THIS CONCERNS ME.
11 COULD IT BE POSSIBLE FOR ME TO BE EXCUSED? [JUROR NO. 7]."

12 I THINK WE SHOULD PROBABLY INQUIRE.

13 MR. LEAHY: WE SHOULD PROBABLY TALK TO HER.

14 THE COURT: LET'S BRING HER IN BY HERSELF.

15 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT
16 IN THE PRESENCE OF JUROR NO. 7:)

17 THE COURT: ALL RIGHT. THE RECORD WILL REFLECT
18 JUROR NUMBER 7 IS PRESENT. AND WE HAVE RECEIVED YOUR NOTE
19 CONCERNING THE FACT THAT YOU THINK THAT THE DEFENDANTS LOOK
20 FAMILIAR. AND I NEED TO INQUIRE A LITTLE BIT MORE ABOUT
21 THIS. AND THE RECORD WILL REFLECT THE JURY IS NOT PRESENT,
22 COUNSEL AND THE DEFENDANTS ARE PRESENT.

23 YOU MAY PROCEED.

24 JUROR NO. 7: I WAS JUST GOING TO SAY, AT FIRST
25 WHEN -- UPON FIRST SIGHT, LIKE I SAID, I THOUGHT THERE WAS
26 SOME KIND OF FAMILIARITY, AND I THOUGHT MAYBE IT COULD HAVE
27 BEEN FROM THE NEWS. I DON'T KNOW. I'M THINKING IT MIGHT NOT
28 BE. I DON'T KNOW IF IT COULD BE. I DON'T KNOW THEM, FIRST

1 OF ALL. BUT THERE'S JUST, YOU KNOW, THEY LOOK FAMILIAR. I
2 DON'T KNOW WHERE FROM. I COULDN'T TELL YOU. I COULDN'T TELL
3 YOU IF IT WAS, YOU KNOW, FROM THE RESTAURANT DOWN THE STREET.
4 I COULDN'T TELL YOU WHERE. BUT IT MAKES ME UNCOMFORTABLE
5 KNOWING THIS. I CAN'T GIVE YOU ANY SPECIFICS. ALL I CAN SAY
6 IS I'M JUST NOT COMFORTABLE WITH IT. I DON'T KNOW WHY, YOU
7 KNOW.

8 THE COURT: WELL, LET ME ASK YOU THIS, THE FACT
9 THAT THEY LOOK FAMILIAR AND YOU'RE NOT SURE WHERE, THAT DOES
10 NOT CAUSE YOU TO PREJUDGE THE CASE, DOES IT?

11 JUROR NO. 7: NO. NO, I'M JUST -- I'M JUST NOT
12 COMFORTABLE WITH THAT, YOU KNOW. MY INSTINCTS SAY SOMETHING
13 JUST DOESN'T FEEL RIGHT.

14 THE COURT: OKAY. NOW, THE FACT THAT YOU MAY OR
15 MAY NOT HAVE SEEN THEM IN THE PAST, DOES THAT AFFECT YOUR
16 ABILITY TO LOOK AT THE EVIDENCE AND MAKE A DETERMINATION
17 BASED SIMPLY ON EVIDENCE THAT COMES IN?

18 JUROR NO. 7: JUST LOOKING, NO, OF COURSE. I MEAN,
19 I KNOW WHAT YOU'RE --

Interrupted

20 THE COURT: AND THEN ~~WOULD~~ YOU BE ABLE TO APPLY THE
21 LAW THAT I GIVE YOU, FACTS, AND FIND THEM BASED STRICTLY ON
22 THE EVIDENCE?³

23 JUROR NO. 7: YOUR WORDS, OF COURSE, MAKE PERFECT
24 SENSE, AND OF COURSE I CAN DO THAT. LIKE I SAID, INTERNALLY,
25 I'M JUST NOT -- I DON'T KNOW. I JUST DON'T FEEL COMFORTABLE.

26 THE COURT: OKAY. BUT SINCE YOU'RE NOT SURE FROM
27 WHAT CONTEXT, SENSING THAT THERE'S SOMETHING MORE, IS THERE A
28 FEAR, OR IS THERE SOME OTHER CONCERN?

1 JUROR NO. 7: SURE, I GUESS IT COULD BE. LIKE I
2 SAID, I DON'T KNOW THEM OR ANYTHING LIKE THAT. BUT, YOU
3 KNOW, I GUESS MY FEAR WOULD BE, EASILY PUT, WOULD BE FEAR OF
4 RETALIATION ONE WAY OR ANOTHER.

5 THE COURT: OKAY. NOW, ONE THING I DID NOT MENTION
6 AT THE BEGINNING, AND WHICH I COULD -- WELL, LET ME DISCUSS
7 WITH THE ATTORNEYS. BUT IT -- WELL, LET ME JUST SPEAK WITH
8 THE ATTORNEYS FOR A MOMENT WITHOUT THE REPORTER.

9 (SIDEBAR CONFERENCE HELD; NOT REPORTED.)

10 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT
11 IN THE PRESENCE OF JUROR NO. 7:)

12 THE COURT: THE RECORD WILL REFLECT WE'RE BACK IN
13 THE COURTROOM. COUNSEL ARE PRESENT, DEFENDANTS ARE PRESENT,
14 AND JUROR NUMBER 7 IS PRESENT. AT THIS TIME, LET ME JUST
15 HAVE THE ATTORNEYS ASK SOME MORE QUESTIONS OF YOU.

16 MR. LEAHY.

17 BY MR. LEAHY:

18 Q. HI.

19 A. HI.

20 Q. YOU USED THE WORD "RETALIATION" A MOMENT AGO. DO
21 YOU REMEMBER THAT? DO YOU REMEMBER USING THE WORD
22 "RETALIATION"?

23 A. YES.

24 Q. THAT SUGGESTS TO ME THAT BECAUSE THERE'S SOME GANG
25 OVERTONES IN THIS CASE, THAT YOU FEEL PERHAPS SOME FEAR ABOUT
26 YOUR INVOLVEMENT IN THE TRIAL; IS THAT CORRECT?

27 A. YES.

28 Q. I GUESS THE REAL QUESTION THAT WE NEED TO KNOW IS,

1 DO YOU THINK THAT YOU CAN SET THAT FEAR ASIDE AS YOU CONSIDER
2 THE EVIDENCE IN THIS CASE?

3 A. I MEAN, ACADEMICALLY, OF COURSE, YES, I CAN. BUT
4 LIKE I SAID, IT JUST -- SOMETHING JUST WASN'T SITTING WELL WE
5 ME. AND I THOUGHT, YOU KNOW, I SHOULD SAY SOMETHING.

6 Q. TO THE BEST OF MY KNOWLEDGE, THESE MEN HAVE NEVER
7 BEEN ON TELEVISION. SO I DON'T THINK YOU WOULD HAVE SEEN
8 THEM BECAUSE OF THAT. CERTAINLY THIS CASE DID NOT GET ANY
9 PUBLICITY.

10 DO YOU THINK THAT YOUR FEELINGS WOULD INFLUENCE HOW YOU
11 DECIDED THE ISSUES IN THIS CASE? DO YOU THINK IT WOULD MAKE
12 YOU MORE PRONE TO FIND THESE YOUNG MEN GUILTY, OR MORE PRONE
13 TO FIND THEM NOT GUILTY?

14 A. NO, I CAN FOLLOW THOSE INSTRUCTIONS. I CAN DO
15 THAT, YOU KNOW, PUTTING LIKE -- I CAN SEPARATE MY EMOTIONS
16 FROM THAT. BUT LIKE I SAID, SOMETHING JUST WASN'T SITTING
17 WELL WE ME. AND I THOUGHT SINCE IT WAS MY CONCERN THAT I
18 SHOULD SPEAK UP BEFORE, YOU KNOW, I WENT ANY FURTHER. THAT'S
19 ALL.

20 Q. WE CERTAINLY APPRECIATE THAT. BUT I THINK YOU CAN
21 UNDERSTAND OUR CONCERN, IS THAT WE NEED TO KNOW THAT YOU CAN
22 LISTEN FAIRLY AND OBJECTIVELY TO THE EVIDENCE, AND WHEN YOU
23 GO BACK INTO THE JURY ROOM, YOU CAN LEAVE ASIDE THOSE
24 FEELINGS, PRESUME THAT THESE GENTLEMEN ARE NOT GUILTY, AND
25 JUST LOOK AT THE EVIDENCE, AND SEE IF THE EVIDENCE CONVINCES
26 YOU OF THEIR GUILT. DO YOU THINK YOU CAN DO THAT?

27 A. YES, I CAN. YOU KNOW, I WAS SITTING HERE, AND I'M
28 THINKING, "OKAY. OF COURSE," LIKE I SAID, "I DON'T KNOW

1 THESE GENTLEMEN." I'M THINKING, "YEAH, THEY COULD BE
2 INNOCENT, I DON'T KNOW. THEY COULD BE GUILTY, I DON'T KNOW."
3 I DON'T KNOW WHAT THE OUTCOME IS GOING TO BE. I JUST HAVE
4 THAT FEELING. AND LIKE I SAID, I THOUGHT SINCE I WASN'T
5 FEELING COMFORTABLE WITH IT, LIKE I SAID, I SHOULD SPEAK UP.

6 MR. LEAHY: I APPRECIATE THAT. THANK YOU VERY
7 MUCH.

8 THE COURT: THANK YOU.

9 MR. SANCHEZ, ANY QUESTIONS?

10 MR. SANCHEZ: NO, YOUR HONOR. NO, THANK YOU.

11 THE COURT: MS. ROACH, ANY QUESTIONS?

12 MS. ROACH: NO, YOUR HONOR.

13 THE COURT: OKAY. AND LET ME JUST INDICATE THAT
14 WHEN THE JURORS RETURN BACK INTO THE COURTROOM, I'M GOING TO
15 BE GIVING ALL THE JURORS AN ADMONISHMENT THAT YOUR NAME AND
16 ALL YOUR PERSONAL INFORMATION WILL BE SEALED PENDING FURTHER
17 COURT ORDER. AND THAT IF THERE IS A REQUEST BY ANY ATTORNEY
18 FOR ANY PERSONAL INFORMATION, THAT WOULD COME TO THE COURT,
19 AND WITH NOTIFICATION TO YOU IN ADVANCE PRIOR TO ANYTHING
20 BEING GIVEN OUT. DOES THAT MAKE YOU FEEL MORE AT EASE?

21 JUROR NO. 7: IT DOES.

22 THE COURT: OKAY. ALL RIGHT. OKAY. WELL, THANK
23 YOU VERY MUCH. AND AT THIS TIME, IF YOU'LL JUST STEP OUTSIDE
24 FOR A MOMENT.

25 JUROR NO. 7: OKAY. SORRY FOR THE INCONVENIENCE.

26 MR. SANCHEZ: NO PROBLEM.

27 (WHEREUPON JUROR NO. 7 EXITED THE COURTROOM AND THE
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Misleading?
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1 THE COURT: ALL RIGHT. THE RECORD WILL REFLECT
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3 DEFENDANTS ARE PRESENT. AND MR. LEAHY.

4 MR. LEAHY: YOUR HONOR, I JUST WOULD LIKE TO ASK
5 THE COURT TO EXCUSE HER BASED ON THE INFORMATION THAT WE
6 HAVE.

7 MR. SANCHEZ: JOIN IN THE MOTION, YOUR HONOR.

8 THE COURT: MS. ROACH?

9 MS. ROACH: I'LL STIPULATE TO THE COURT.

10 THE COURT: BASED ON JUROR NUMBER 7'S COMMENTS, I
11 THINK SHE WAS JUST BEING CAREFUL, AND IN AN ABUNDANCE OF
12 CAUTION BECAUSE OF THE POSSIBILITY THAT SHE MAY HAVE SEEN
13 THEM IN THE PAST, SHE DOES EXPRESS CONCERN, AND SHE DID USE
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15 THAT THAT CAME AFTER LISTENING TO THE WITNESS, HERRERA'S
16 TESTIMONY, WHEREIN HE EXPRESSES SOME FEAR OF RETALIATION, MAY
17 HAVE PUT THAT THOUGHT IN HER MIND, BECAUSE CERTAINLY SHE DID
18 NOT COME FORWARD EARLIER ABOUT RECOGNIZING ANYBODY OR
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20 SOMETHING, OR IN TERMS OF WHAT HAS CAUSED HER TO COME FORWARD
21 AND MAKE THE STATEMENTS. BUT IT IS CLEAR FROM THE QUESTIONS,
22 THAT SHE WILL BE ABLE TO LISTEN TO THE EVIDENCE AND MAKE HER
23 DECISION SIMPLY ON THE EVIDENCE AND THE LAWS AS I INSTRUCT
24 HER. AND, THEREFORE, THE REQUEST TO HAVE HER REMOVED AT THIS
25 TIME WILL BE DENIED.

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27 ADMONITION TO THE JURY WHEN THEY RETURN INTO THE COURTROOM
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*Trilateral
Agreement!*

1 SEALED PENDING FURTHER COURT ORDER, AND WE WILL SIMPLY REFER
2 TO THEM BY THEIR SEAT NUMBER FROM NOW ON. AND IF THERE -- IF
3 ANYBODY HAS ANY KIND OF CONCERN, I THINK THAT WILL HELP THEM.

4 OKAY. SO AT THIS TIME, WE'LL CALL IN THE JURY. AND
5 THIS NOTE WILL BE COURT'S EXHIBIT 3.

6 (WHEREUPON THE JURY ENTERED THE COURTROOM AND THE
7 FOLLOWING PROCEEDINGS WERE HAD:)

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9 COUNSEL AND THE REPORTER.

10 (WHEREUPON THE FOLLOWING PROCEEDINGS WERE HELD IN
11 CHAMBERS OUT OF THE PRESENCE OF THE JURY:)

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13 ARE PRESENT OUTSIDE THE PRESENCE OF THE JURY.

14 I HAVE RECEIVED YET ANOTHER LETTER, AND THIS ONE IS
15 TYPED: "DEAR JUDGE HERNANDEZ, AFTER HEARING OPENING
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17 TO PROVIDE YOU. AS I STATED ON TUESDAY, AUGUST 5TH, DURING
18 JURY SELECTION, I PRESENTLY WORK AS A SCHOOL COUNSELOR IN
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20 TAKING A COUNSELING POSITION AT SAN YSIDRO ADULT SCHOOL. I
21 TELL YOU THIS BECAUSE IT WAS BROUGHT UP IN COURT THAT THE
22 SUSPECTS IN THE CASE COULD BE AFFILIATED WITH THE, QUOTE,
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25 INVOLVES COMMUNITY OUTREACH, ALONG WITH BEING THE POINT OF
26 CONTACT WITH EDUCATIONAL AND VOCATIONAL OPPORTUNITIES AT THE
27 SCHOOL SITE FOR STUDENTS 17 YEARS OF AGE AND OLDER. WORK
28 HOURS ARE MORNINGS, AFTERNOONS, AND EVENINGS, ALONG WITH AN

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3 FOR THE MOST PART, INDIVIDUALS ARE NOT TURNED AWAY FROM
4 ENROLLING IN CLASSES AT THE SCHOOL. BASICALLY, WE TRY TO
5 HELP ANYONE WHO WALKS IN THE DOOR ASKING FOR INFORMATION OR
6 ASSISTANCE. GIVEN THIS POSITION, IT IS LIKELY I WILL HAVE
7 CONTACT WITH PEOPLE WHO KNOW OF OR ARE INVOLVED WITH THE,
8 QUOTE, SIDRO, END QUOTE, GANG, OR MAY BE FAMILIAR WITH THIS
9 CASE. IT IS ALSO POSSIBLE I COULD HAVE CONTACT WITH THE
10 SUSPECTS THEMSELVES AT SOME POINT, AND/OR THEIRSELVES OR
11 FRIENDS. THERE MAY HAVE BEEN PEOPLE IN THE COURTROOM THIS
12 MORNING WHO PRESENTLY ARE STUDENTS AT THE SCHOOL WHO I AM NOT
13 AWARE OF.

14 THESE POSSIBILITIES, QUITE FRANKLY, ARE BOTHERSOME FOR
15 ME. I CANNOT GUARANTEE THAT MY DECISION IN THIS CASE WILL
16 NOT BE INFLUENCED BY THE POTENTIAL OF CONTACT WITH
17 INDIVIDUALS INVOLVED WITH THIS CASE AT SOME TIME IN THE
18 FUTURE. THEREFORE, I ASK YOU CONSIDER TO ALLOW ME BE REMOVED
19 FROM THIS CASE.

20 SINCERELY [JUROR NO. 10], JUROR NUMBER 10."

21 SO YET AGAIN WE HAVE ANOTHER JUROR COMING FORWARD WITH
22 SOME FEAR OF RETALIATION.

23 MS. ROACH: I'M NOT SURE IF IT'S FEAR OF
24 RETALIATION OR SIMPLY THAT HE'D BE AFFECTED IN SOME WAY OF
25 KNOWING THE PEOPLE.

26 THE COURT: HE SAYS "INFLUENCED AT SOME POINT IN
27 THE FUTURE."

28 MR. SANCHEZ: I'M ALSO CONCERNED THAT THESE JURORS

1 ARE TALKING TO ONE ANOTHER REGARDING THIS ISSUE OF
2 RETALIATION.

3 THE COURT: WELL, I WILL AGAIN ADMONISH THEM THAT
4 THEY CANNOT BE TALKING WITH ANYONE, INCLUDING FELLOW JURORS,
5 ABOUT ANYTHING REGARDING THE CASE.

6 WHAT I SUGGEST WE DO IS WE ASK THIS INDIVIDUAL
7 SEPARATELY ABOUT THE EXTENT OF THAT CONCERN.

8 MS. ROACH: THE OTHER THING IS THAT HE'S NOT GOING
9 TO BE STARTING THIS JOB FOR THE NEXT TWO WEEKS. WE MAYBE WE
10 CAN EVEN DO AN ORDER WHERE HE IS NOT TO GO TO THE JOB UNTIL
11 HE'S COMPLETED HIS DELIBERATIONS.

12 MR. LEAHY: WELL, I'M THINKING THAT WAS NOT WHAT
13 HE'S CONCERNED ABOUT. HE'S CONCERNED ABOUT THE FUTURE.

14 THE COURT: RIGHT.

15 MR. SANCHEZ: WHEN HE DOES GO TO WORK.

16 THE COURT: HIS CONCERN IS ABOUT ONCE HE'S AT THE
17 WORK SITE.

18 MS. ROACH: SO I GUESS THAT IS A FEAR OF
19 RETALIATION. I DON'T KNOW WHAT ELSE IT COULD BE.

20 THE COURT: WELL, AT THIS POINT, LET'S DO THIS.
21 WE'LL ASK JUROR NUMBER 10 TO REMAIN, ASK THE OTHERS TO STEP
22 OUT WHILE WE JUST GO OVER IT.

23 MR. SANCHEZ: YOU WANT TO BRING HIM BACK HERE, OR
24 YOU WANT TO TELL EVERYBODY TO LEAVE?

25 THE COURT: WELL, LET'S BRING JUROR NUMBER 10 BACK.
26 THAT WILL PROBABLY BE BEST.

27 (THE FOLLOWING PROCEEDINGS WERE HELD IN CHAMBERS IN
28 THE PRESENCE OF JUROR NO. 10:)

1 CHULA VISTA, CALIFORNIA; THURSDAY, AUGUST 7, 2003; 1:32 P.M.

2 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT
3 OUT OF THE PRESENCE OF THE JURORS:)

4 THE COURT: THE RECORD WILL REFLECT COUNSEL IS
5 PRESENT, DEFENDANTS ARE PRESENT, THE JURY IS NOT PRESENT. WE
6 HAVE A NOTE HERE FROM ~~JUROR NUMBER 7~~. IT READS: "I HAVE
7 SOME CONCERNS REGARDING THE DEFENDANTS. THEY LOOK FAMILIAR.
8 AT FIRST SIGHT, I THOUGHT I MIGHT HAVE SEEN THEM ON
9 TELEVISION, PARENTHESIS, NEWS. THE MORE I LOOK AT THEM, I
10 THINK IT MIGHT BE SOMEWHERE ELSE, AND THIS CONCERNS ME.
11 COULD IT BE POSSIBLE FOR ME TO BE EXCUSED? [JUROR NO. 7]."

12 I THINK WE SHOULD PROBABLY INQUIRE.

13 MR. LEAHY: WE SHOULD PROBABLY TALK TO HER.

14 THE COURT: LET'S BRING HER IN BY HERSELF.

15 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT
16 IN THE PRESENCE OF JUROR NO. 7:)

17 THE COURT: ALL RIGHT. THE RECORD WILL REFLECT
18 JUROR NUMBER 7 IS PRESENT. AND WE HAVE RECEIVED YOUR NOTE
19 CONCERNING THE FACT THAT YOU THINK THAT THE DEFENDANTS LOOK
20 FAMILIAR. AND I NEED TO INQUIRE A LITTLE BIT MORE ABOUT
21 THIS. AND THE RECORD WILL REFLECT THE JURY IS NOT PRESENT,
22 COUNSEL AND THE DEFENDANTS ARE PRESENT.

23 YOU MAY PROCEED.

24 JUROR NO. 7: I WAS JUST GOING TO SAY, AT FIRST
25 WHEN -- UPON FIRST SIGHT, LIKE I SAID, I THOUGHT THERE WAS
26 SOME KIND OF FAMILIARITY, AND I THOUGHT MAYBE IT COULD HAVE
27 BEEN FROM THE NEWS. I DON'T KNOW. I'M THINKING IT MIGHT NOT
28 BE. I DON'T KNOW IF IT COULD BE. I DON'T KNOW THEM, FIRST

1 OF ALL. BUT THERE'S JUST, YOU KNOW, THEY LOOK FAMILIAR. I
2 DON'T KNOW WHERE FROM. I COULDN'T TELL YOU. I COULDN'T TELL
3 YOU IF IT WAS, YOU KNOW, FROM THE RESTAURANT DOWN THE STREET.
4 I COULDN'T TELL YOU WHERE. BUT IT MAKES ME UNCOMFORTABLE
5 KNOWING THIS. I CAN'T GIVE YOU ANY SPECIFICS. ALL I CAN SAY
6 IS I'M JUST NOT COMFORTABLE WITH IT. I DON'T KNOW WHY, YOU
7 KNOW.

8 THE COURT: WELL, LET ME ASK YOU THIS, THE FACT
9 THAT THEY LOOK FAMILIAR AND YOU'RE NOT SURE WHERE, THAT DOES
10 NOT CAUSE YOU TO PREJUDGE THE CASE, DOES IT?

11 JUROR NO. 7: NO. NO, I'M JUST -- I'M JUST NOT
12 COMFORTABLE WITH THAT, YOU KNOW. MY INSTINCTS SAY SOMETHING
13 JUST DOESN'T FEEL RIGHT.

14 THE COURT: OKAY. NOW, THE FACT THAT YOU MAY OR
15 MAY NOT HAVE SEEN THEM IN THE PAST, DOES THAT AFFECT YOUR
16 ABILITY TO LOOK AT THE EVIDENCE AND MAKE A DETERMINATION
17 BASED SIMPLY ON EVIDENCE THAT COMES IN?

18 JUROR NO. 7: JUST LOOKING, NO, OF COURSE. I MEAN,
19 I KNOW WHAT YOU'RE --

Interrupted

20 THE COURT: AND THEN ~~SW~~ WOULD YOU BE ABLE TO APPLY THE
21 LAW THAT I GIVE YOU, FACTS, AND FIND THEM BASED STRICTLY ON
22 THE EVIDENCE?

23 JUROR NO. 7: YOUR WORDS, OF COURSE, MAKE PERFECT
24 SENSE, AND OF COURSE I CAN DO THAT. LIKE I SAID, INTERNALLY,
25 I'M JUST NOT -- I DON'T KNOW. I JUST DON'T FEEL COMFORTABLE.

26 THE COURT: OKAY. BUT SINCE YOU'RE NOT SURE FROM
27 WHAT CONTEXT, SENSING THAT THERE'S SOMETHING MORE, IS THERE A
28 FEAR, OR IS THERE SOME OTHER CONCERN?

1 JUROR NO. 7: SURE, I GUESS IT COULD BE. LIKE I
2 SAID, I DON'T KNOW THEM OR ANYTHING LIKE THAT. BUT, YOU
3 KNOW, I GUESS MY FEAR WOULD BE, EASILY PUT, WOULD BE FEAR OF
4 RETALIATION ONE WAY OR ANOTHER.

5 THE COURT: OKAY. NOW, ONE THING I DID NOT MENTION
6 AT THE BEGINNING, AND WHICH I COULD -- WELL, LET ME DISCUSS
7 WITH THE ATTORNEYS. BUT IT -- WELL, LET ME JUST SPEAK WITH
8 THE ATTORNEYS FOR A MOMENT WITHOUT THE REPORTER.

9 (SIDEBAR CONFERENCE HELD; NOT REPORTED.)

10 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT
11 IN THE PRESENCE OF JUROR NO. 7:)

12 THE COURT: THE RECORD WILL REFLECT WE'RE BACK IN
13 THE COURTROOM. COUNSEL ARE PRESENT, DEFENDANTS ARE PRESENT,
14 AND JUROR NUMBER 7 IS PRESENT. AT THIS TIME, LET ME JUST
15 HAVE THE ATTORNEYS ASK SOME MORE QUESTIONS OF YOU.

16 MR. LEAHY.

17 BY MR. LEAHY:

18 Q. HI.

19 A. HI.

20 Q. YOU USED THE WORD "RETALIATION" A MOMENT AGO. DO
21 YOU REMEMBER THAT? DO YOU REMEMBER USING THE WORD
22 "RETALIATION"?

23 A. YES.

24 Q. THAT SUGGESTS TO ME THAT BECAUSE THERE'S SOME GANG
25 OVERTONES IN THIS CASE, THAT YOU FEEL PERHAPS SOME FEAR ABOUT
26 YOUR INVOLVEMENT IN THE TRIAL; IS THAT CORRECT?

27 A. YES.

28 Q. I GUESS THE REAL QUESTION THAT WE NEED TO KNOW IS,

1 DO YOU THINK THAT YOU CAN SET THAT FEAR ASIDE AS YOU CONSIDER
2 THE EVIDENCE IN THIS CASE?

3 A. I MEAN, ACADEMICALLY, OF COURSE, YES, I CAN. BUT
4 LIKE I SAID, IT JUST -- SOMETHING JUST WASN'T SITTING WELL WE
5 ME. AND I THOUGHT, YOU KNOW, I SHOULD SAY SOMETHING.

6 Q. TO THE BEST OF MY KNOWLEDGE, THESE MEN HAVE NEVER
7 BEEN ON TELEVISION. SO I DON'T THINK YOU WOULD HAVE SEEN
8 THEM BECAUSE OF THAT. CERTAINLY THIS CASE DID NOT GET ANY
9 PUBLICITY.

10 DO YOU THINK THAT YOUR FEELINGS WOULD INFLUENCE HOW YOU
11 DECIDED THE ISSUES IN THIS CASE? DO YOU THINK IT WOULD MAKE
12 YOU MORE PRONE TO FIND THESE YOUNG MEN GUILTY, OR MORE PRONE
13 TO FIND THEM NOT GUILTY?

14 A. NO, I CAN FOLLOW THOSE INSTRUCTIONS. I CAN DO
15 THAT, YOU KNOW, PUTTING LIKE -- I CAN SEPARATE MY EMOTIONS
16 FROM THAT. BUT LIKE I SAID, SOMETHING JUST WASN'T SITTING
17 WELL WE ME. AND I THOUGHT SINCE IT WAS MY CONCERN THAT I
18 SHOULD SPEAK UP BEFORE, YOU KNOW, I WENT ANY FURTHER. THAT'S
19 ALL.

20 Q. WE CERTAINLY APPRECIATE THAT. BUT I THINK YOU CAN
21 UNDERSTAND OUR CONCERN, IS THAT WE NEED TO KNOW THAT YOU CAN
22 LISTEN FAIRLY AND OBJECTIVELY TO THE EVIDENCE, AND WHEN YOU
23 GO BACK INTO THE JURY ROOM, YOU CAN LEAVE ASIDE THOSE
24 FEELINGS, PRESUME THAT THESE GENTLEMEN ARE NOT GUILTY, AND
25 JUST LOOK AT THE EVIDENCE, AND SEE IF THE EVIDENCE CONVINCES
26 YOU OF THEIR GUILT. DO YOU THINK YOU CAN DO THAT?

27 A. YES, I CAN. YOU KNOW, I WAS SITTING HERE, AND I'M
28 THINKING, "OKAY. OF COURSE," LIKE I SAID, "I DON'T KNOW

1 THESE GENTLEMEN." I'M THINKING, "YEAH, THEY COULD BE
2 INNOCENT, I DON'T KNOW. THEY COULD BE GUILTY, I DON'T KNOW."
3 I DON'T KNOW WHAT THE OUTCOME IS GOING TO BE. I JUST HAVE
4 THAT FEELING. AND LIKE I SAID, I THOUGHT SINCE I WASN'T
5 FEELING COMFORTABLE WITH IT, LIKE I SAID, I SHOULD SPEAK UP.

6 MR. LEAHY: I APPRECIATE THAT. THANK YOU VERY
7 MUCH.

8 THE COURT: THANK YOU.

9 MR. SANCHEZ, ANY QUESTIONS?

10 MR. SANCHEZ: NO, YOUR HONOR. NO, THANK YOU.

11 THE COURT: MS. ROACH, ANY QUESTIONS?

12 MS. ROACH: NO, YOUR HONOR.

13 THE COURT: OKAY. AND LET ME JUST INDICATE THAT
14 WHEN THE JURORS RETURN BACK INTO THE COURTROOM, I'M GOING TO
15 BE GIVING ALL THE JURORS AN ADMONISHMENT THAT YOUR NAME AND
16 ALL YOUR PERSONAL INFORMATION WILL BE SEALED PENDING FURTHER
17 COURT ORDER. AND THAT IF THERE IS A REQUEST BY ANY ATTORNEY
18 FOR ANY PERSONAL INFORMATION, THAT WOULD COME TO THE COURT,
19 AND WITH NOTIFICATION TO YOU IN ADVANCE PRIOR TO ANYTHING
20 BEING GIVEN OUT. DOES THAT MAKE YOU FEEL MORE AT EASE?

21 JUROR NO. 7: IT DOES.

22 THE COURT: OKAY. ALL RIGHT. OKAY. WELL, THANK
23 YOU VERY MUCH. AND AT THIS TIME, IF YOU'LL JUST STEP OUTSIDE
24 FOR A MOMENT.

25 JUROR NO. 7: OKAY. SORRY FOR THE INCONVENIENCE.

26 MR. SANCHEZ: NO PROBLEM.

27 (WHEREUPON JUROR NO. 7 EXITED THE COURTROOM AND THE
28 FOLLOWING PROCEEDINGS WERE HELD:)

Misleading?
Proper reiteration
of 100.

1 THE COURT: ALL RIGHT. THE RECORD WILL REFLECT
2 THAT JUROR NO. 7 HAS LEFT THE ROOM. COUNSEL ARE PRESENT,
3 DEFENDANTS ARE PRESENT. AND MR. LEAHY.

4 MR. LEAHY: YOUR HONOR, I JUST WOULD LIKE TO ASK
5 THE COURT TO EXCUSE HER BASED ON THE INFORMATION THAT WE
6 HAVE.

7 MR. SANCHEZ: JOIN IN THE MOTION, YOUR HONOR.

8 THE COURT: MS. ROACH?

9 MS. ROACH: I'LL STIPULATE TO THE COURT.

10 THE COURT: BASED ON JUROR NUMBER 7'S COMMENTS, I
11 THINK SHE WAS JUST BEING CAREFUL, AND IN AN ABUNDANCE OF
12 CAUTION BECAUSE OF THE POSSIBILITY THAT SHE MAY HAVE SEEN
13 THEM IN THE PAST, SHE DOES EXPRESS CONCERN, AND SHE DID USE
14 THE WORD "RETALIATION" AT SOME POINT. AND I THINK THE FACT
15 THAT THAT CAME AFTER LISTENING TO THE WITNESS, HERRERA'S
16 TESTIMONY, WHEREIN HE EXPRESSES SOME FEAR OF RETALIATION, MAY
17 HAVE PUT THAT THOUGHT IN HER MIND, BECAUSE CERTAINLY SHE DID
18 NOT COME FORWARD EARLIER ABOUT RECOGNIZING ANYBODY OR
19 ANYTHING OF THAT NATURE. AND I THINK THAT THAT'S PROBABLY
20 SOMETHING, OR IN TERMS OF WHAT HAS CAUSED HER TO COME FORWARD
21 AND MAKE THE STATEMENTS. BUT IT IS CLEAR FROM THE QUESTIONS,
22 THAT SHE WILL BE ABLE TO LISTEN TO THE EVIDENCE AND MAKE HER
23 DECISION SIMPLY ON THE EVIDENCE AND THE LAWS AS I INSTRUCT
24 HER. AND, THEREFORE, THE REQUEST TO HAVE HER REMOVED AT THIS
25 TIME WILL BE DENIED.

26 AND WHAT I WILL DO IS, I WILL JUST MAKE A GENERAL
27 ADMONITION TO THE JURY WHEN THEY RETURN INTO THE COURTROOM
28 THAT ALL OF THEIR INFORMATION, INCLUDING THEIR NAMES, WILL BE

*Tri-lateral
Agreement!*

1 SEALED PENDING FURTHER COURT ORDER, AND WE WILL SIMPLY REFER
2 TO THEM BY THEIR SEAT NUMBER FROM NOW ON. AND IF THERE -- IF
3 ANYBODY HAS ANY KIND OF CONCERN, I THINK THAT WILL HELP THEM.

4 OKAY. SO AT THIS TIME, WE'LL CALL IN THE JURY. AND
5 THIS NOTE WILL BE COURT'S EXHIBIT 3.

6 (WHEREUPON THE JURY ENTERED THE COURTROOM AND THE
7 FOLLOWING PROCEEDINGS WERE HAD:)

8 THE COURT: OKAY. LET ME HAVE JUST A MOMENT WITH
9 COUNSEL AND THE REPORTER.

10 (WHEREUPON THE FOLLOWING PROCEEDINGS WERE HELD IN
11 CHAMBERS OUT OF THE PRESENCE OF THE JURY:)

12 THE COURT: THE RECORD WILL REFLECT COUNSEL AND I
13 ARE PRESENT OUTSIDE THE PRESENCE OF THE JURY.

14 I HAVE RECEIVED YET ANOTHER LETTER, AND THIS ONE IS
15 TYPED: "DEAR JUDGE HERNANDEZ, AFTER HEARING OPENING
16 STATEMENTS THIS MORNING, I FEEL THERE IS INFORMATION I NEED
17 TO PROVIDE YOU. AS I STATED ON TUESDAY, AUGUST 5TH, DURING
18 JURY SELECTION, I PRESENTLY WORK AS A SCHOOL COUNSELOR IN
19 NATIONAL CITY. BUT WITHIN THE NEXT TWO WEEKS, I PLAN TO BE
20 TAKING A COUNSELING POSITION AT SAN YSIDRO ADULT SCHOOL. I
21 TELL YOU THIS BECAUSE IT WAS BROUGHT UP IN COURT THAT THE
22 SUSPECTS IN THE CASE COULD BE AFFILIATED WITH THE, QUOTE,
23 SIDRO, END QUOTE, GANG.

24 THE COUNSELING POSITION AT SAN YSIDRO ADULT SCHOOL
25 INVOLVES COMMUNITY OUTREACH, ALONG WITH BEING THE POINT OF
26 CONTACT WITH EDUCATIONAL AND VOCATIONAL OPPORTUNITIES AT THE
27 SCHOOL SITE FOR STUDENTS 17 YEARS OF AGE AND OLDER. WORK
28 HOURS ARE MORNINGS, AFTERNOONS, AND EVENINGS, ALONG WITH AN

1 ADDITIONAL SATURDAY.

2 SUFFICE IT TO SAY, THERE IS CONTINUAL PUBLIC CONTACT.
3 FOR THE MOST PART, INDIVIDUALS ARE NOT TURNED AWAY FROM
4 ENROLLING IN CLASSES AT THE SCHOOL. BASICALLY, WE TRY TO
5 HELP ANYONE WHO WALKS IN THE DOOR ASKING FOR INFORMATION OR
6 ASSISTANCE. GIVEN THIS POSITION, IT IS LIKELY I WILL HAVE
7 CONTACT WITH PEOPLE WHO KNOW OF OR ARE INVOLVED WITH THE,
8 QUOTE, SIDRO, END QUOTE, GANG, OR MAY BE FAMILIAR WITH THIS
9 CASE. IT IS ALSO POSSIBLE I COULD HAVE CONTACT WITH THE
10 SUSPECTS THEMSELVES AT SOME POINT, AND/OR THEIRSELVES OR
11 FRIENDS. THERE MAY HAVE BEEN PEOPLE IN THE COURTROOM THIS
12 MORNING WHO PRESENTLY ARE STUDENTS AT THE SCHOOL WHO I AM NOT
13 AWARE OF.

14 THESE POSSIBILITIES, QUITE FRANKLY, ARE BOTHERSOME FOR
15 ME. I CANNOT GUARANTEE THAT MY DECISION IN THIS CASE WILL
16 NOT BE INFLUENCED BY THE POTENTIAL OF CONTACT WITH
17 INDIVIDUALS INVOLVED WITH THIS CASE AT SOME TIME IN THE
18 FUTURE. THEREFORE, I ASK YOU CONSIDER TO ALLOW ME BE REMOVED
19 FROM THIS CASE.

20 SINCERELY [JUROR NO. 10], JUROR NUMBER 10."

21 SO YET AGAIN WE HAVE ANOTHER JUROR COMING FORWARD WITH
22 SOME FEAR OF RETALIATION.

23 MS. ROACH: I'M NOT SURE IF IT'S FEAR OF
24 RETALIATION OR SIMPLY THAT HE'D BE AFFECTED IN SOME WAY OF
25 KNOWING THE PEOPLE.

26 THE COURT: HE SAYS "INFLUENCED AT SOME POINT IN
27 THE FUTURE."

28 MR. SANCHEZ: I'M ALSO CONCERNED THAT THESE JURORS

1 ARE TALKING TO ONE ANOTHER REGARDING THIS ISSUE OF
2 RETALIATION.

3 THE COURT: WELL, I WILL AGAIN ADMONISH THEM THAT
4 THEY CANNOT BE TALKING WITH ANYONE, INCLUDING FELLOW JURORS,
5 ABOUT ANYTHING REGARDING THE CASE.

6 WHAT I SUGGEST WE DO IS WE ASK THIS INDIVIDUAL
7 SEPARATELY ABOUT THE EXTENT OF THAT CONCERN.

8 MS. ROACH: THE OTHER THING IS THAT HE'S NOT GOING
9 TO BE STARTING THIS JOB FOR THE NEXT TWO WEEKS. WE MAYBE WE
10 CAN EVEN DO AN ORDER WHERE HE IS NOT TO GO TO THE JOB UNTIL
11 HE'S COMPLETED HIS DELIBERATIONS.

12 MR. LEAHY: WELL, I'M THINKING THAT WAS NOT WHAT
13 HE'S CONCERNED ABOUT. HE'S CONCERNED ABOUT THE FUTURE.

14 THE COURT: RIGHT.

15 MR. SANCHEZ: WHEN HE DOES GO TO WORK.

16 THE COURT: HIS CONCERN IS ABOUT ONCE HE'S AT THE
17 WORK SITE.

18 MS. ROACH: SO I GUESS THAT IS A FEAR OF
19 RETALIATION. I DON'T KNOW WHAT ELSE IT COULD BE.

20 THE COURT: WELL, AT THIS POINT, LET'S DO THIS.
21 WE'LL ASK JUROR NUMBER 10 TO REMAIN, ASK THE OTHERS TO STEP
22 OUT WHILE WE JUST GO OVER IT.

23 MR. SANCHEZ: YOU WANT TO BRING HIM BACK HERE, OR
24 YOU WANT TO TELL EVERYBODY TO LEAVE?

25 THE COURT: WELL, LET'S BRING JUROR NUMBER 10 BACK.
26 THAT WILL PROBABLY BE BEST.

27 (THE FOLLOWING PROCEEDINGS WERE HELD IN CHAMBERS IN
28 THE PRESENCE OF JUROR NO. 10:)

1 THE COURT: ALL RIGHT. THE RECORD WILL REFLECT
2 JUROR NUMBER 10 IS PRESENT. WE'RE OUTSIDE THE PRESENCE OF
3 THE JURY WITH COUNSEL. AND WE HAVE RECEIVED AND READ YOUR
4 LETTER TO THE COURT. AND I SIMPLY NEED TO INQUIRE OF YOU
5 ABOUT YOUR CONCERN. CAN YOU EXPLAIN A LITTLE BIT MORE ABOUT
6 YOUR CONCERN OTHER THAN WHAT YOU'VE ALREADY WRITTEN?

7 JUROR NO. 10: SURE. IRREGARDLESS OF, FOR EXAMPLE,
8 THE OUTCOME OF THE CASE, IF ONE OF THOSE TWO INDIVIDUALS, TWO
9 SUSPECTS, OR FAMILY MEMBERS WHO MAY HAVE SEEN ME, NOT KNOWING
10 MYSELF WHAT THE OUTCOME IS, EVEN IF THEY WALK INTO AN AREA,
11 I'M BASICALLY THE NUMBER 2 PERSON THERE ON THE SITE, ALTHOUGH
12 REALLY NUMBER 1 IN TERMS OF THE PUBLIC, BECAUSE IT'S KIND OF
13 CLOSED DOORS. ~~S~~SOMEBODY WALKS INTO THAT OFFICE, RECOGNIZES ME
14 FROM THE CASE, GOES BACK -- OR IF I KNOW, FOR EXAMPLE, THOSE
15 TWO GENTLEMEN, I WOULD FEEL UNCOMFORTABLE DOING MY DUTIES TO
16 ASSIST THEM, NOT KNOWING, LIKE I SAID, WHAT RAMIFICATION, OR
17 WHAT THEY MAY BE FEELING AS A RESULT OF THE COURT CASE. ~~4~~

18 THE COURT: OKAY. NOW, LET ME ASK YOU THIS, AT
19 THIS POINT, NOT HAVING -- WELL, JUST HAVING HEARD THE
20 EVIDENCE THAT YOU'VE HEARD SO FAR, WOULD YOU STILL BE ABLE TO
21 DO THE TWO THINGS THAT I MENTIONED AT THE BEGINNING, THAT IS,
22 BASED SIMPLY ON THE EVIDENCE THAT COMES IN, AND NOT FROM ANY
23 OTHER OUTSIDE CONSIDERATION, DETERMINE WHAT THE FACTS ARE
24 BASED SIMPLY ON THE EVIDENCE. CAN YOU DO THAT?

25 JUROR NO. 10: YES, I CAN, YOUR HONOR.

26 THE COURT: WOULD YOU BE ABLE TO APPLY THE LAW THAT
27 I GIVE YOU TO THOSE FACTS AS I DETERMINE THEM?

28 JUROR NO. 10: I BELIEVE I COULD APPLY THE LAW.

Incongruent with ps.
16A, lns. 15-18

1 AGAIN MY -- I WOULD BE WRESTLING. I'M GOING TO BE HONEST
2 WITH YOU. I'M GOING TO BE WRESTLING WITH MY CONSCIENCE IN
3 TERMS OF, IRREGARDLESS OF HOW I SEE THE FACTS, I WOULD BE
4 WRESTLING BEING THAT IN THE BACK OF MY MIND, I'M IN A
5 SITUATION IN A LOCAL WHERE THERE IS PROBABLY THE POTENTIAL
6 FOR CONTACT WITH THOSE TWO GENTLEMEN, OR SOMEONE ELSE. LIKE
7 I SAID, THERE COULD VERY WELL BE SOMEBODY OUT THERE RIGHT NOW
8 IN THE COURTROOM WHO ATTENDS CLASSES THERE WHO I'M NOT EVEN
9 AWARE OF. AND I'M THERE IN A COUPLE OF WEEKS, AND THEY MAY
10 SEE THAT, IRREGARDLESS OF WHAT THE OUTCOME OF THE CASE IS.

11 THE COURT: OKAY. SO DO YOU THINK THAT THAT
12 CONCERN IN THE BACK OF YOUR MIND WOULD BE ALLEVIATED BY THE
13 COURT SEALING ALL YOUR PERSONAL INFORMATION?

14 JUROR NO. 10: I DON'T KNOW. I DON'T KNOW IF
15 THAT'S AN ISSUE NECESSARILY, BECAUSE RIGHT NOW, THERE'S
16 POTENTIAL VISUAL INFORMATION, PEOPLE, AND I DON'T KNOW. BUT
17 HAVING WORKED AT THE ADULT SCHOOL BEFORE, I KNOW, LIKE I
18 SAID, I'M BASICALLY THE POINT OF CONTACT, AND PEOPLE COME IN
19 WHETHER THEY'RE GOING TO TAKE CLASSES OR NOT. THEY ASK FOR
20 INFORMATION, AND WE ATTEMPT TO ASSIST JUST ANYBODY WHO'S
21 THERE. SO AGAIN, THAT'S BASICALLY THE POINT CONTACT AT THAT
22 SCHOOL.

23 AND AGAIN, IF I WAS STAYING IN NATIONAL CITY, IT REALLY
24 WOULD NOT BE A PROBLEM FOR ME. SO GIVEN THE FACT THAT I'M
25 GOING TO SAN YSIDRO, IT IS GOING TO BE A PROBLEM FOR ME.

26 THE COURT: OKAY. AND DURING THE JURY SELECTION
27 PROCESS, YOU DID NOT RAISE THAT AT THE TIME. IS THERE
28 SOMETHING THAT HAS OCCURRED IN-BETWEEN THAT HAS CAUSED YOU TO

1 COME FORWARD WITH THIS?

2 JUROR NO. 10: WELL, YES, BECAUSE NO INFORMATION
3 THAT WE WERE GIVEN WAS -- THERE WAS NO INFORMATION THAT
4 CONCERNED THAT THESE GENTLEMEN MAY RESIDE OR WERE PART OF THE
5 SIDRO GANG THAT CAME UP THIS MORNING. I WAS NOT AWARE OF
6 THAT PRIOR TO THIS MORNING. AS I RECALL, THERE WAS GANG
7 AFFILIATION POTENTIALLY, BUT IT DID NOT INDICATE WHICH
8 PARTICULAR AREA OF TOWN.

9 THE COURT: OKAY. MR. LEAHY, YOU CARE TO INQUIRE?

10 MR. LEAHY: JUST A LITTLE BIT, YOUR HONOR.

11 BY MR. LEAHY:

12 Q. SIR, DID YOU -- HAVE YOU TALKED WITH ANY OF THE
13 OTHER JURORS ABOUT THESE CONCERNS THAT YOU'RE HAVING?

14 A. NO, NOT AT ALL.

15 Q. I TAKE IT THAT YOU HAVE A CONCERN THAT THIS WHOLE
16 ISSUE WILL SOMEHOW CREEP INTO HOW YOU DECIDE THE CASE; IS
17 THAT WHAT YOU'RE SAYING TO US?

18 A. I BELIEVE IT COULD HAPPEN, YES. I DON'T KNOW THAT
19 FOR SURE AT THIS POINT. BUT I BELIEVE THAT'S A POSSIBILITY.

20 Q. AND THAT'S BECAUSE THIS IS A SAN YSIDRO GANG, AND
21 YOU'RE HEAD OF THE SAN YSIDRO -- I UNDERSTAND FROM YOUR
22 LETTER THAT YOU'LL HAVE CONTACT WITH YOUNG ADULTS, I GUESS?

23 A. PRIMARILY YOUNG ADULTS. IT'S MY PARTICULAR AREA.

24 MR. LEAHY: OKAY. THANK YOU, SIR.

25 THE COURT: OKAY. MR. SANCHEZ, ANY QUESTIONS?

26 MR. SANCHEZ: NO, YOUR HONOR. I DON'T HAVE ANY
27 QUESTIONS. THANK YOU.

28 THE COURT: MS. ROACH, ANY QUESTIONS?

1 BY MS. ROACH:

2 Q. IN WHAT AREA DO YOU THINK A POSSIBLE -- I GUESS
3 WHAT I WANT TO TRY AND FIGURE OUT, IF YOU'RE CONCERNED ABOUT
4 YOUR ABILITY TO DO YOUR JOB LATER IN THE COMMUNITY, OR IF
5 YOU'RE CONCERNED ABOUT YOUR ABILITY TO DELIBERATE FAIRLY AND
6 IMPARTIALLY?

7 A. BOTH.

8 Q. AND WITH REGARD TO THE DELIBERATION SITUATION, YOU
9 DON'T KNOW THE INDIVIDUALS, DON'T KNOW WHETHER OR NOT YOU
10 WILL HAVE ANY CONTACT, WHAT IS IT -- WHAT IS IT YOU'RE
11 CONCERNED ABOUT IMPACTING YOUR DELIBERATIONS? I'M ASSUMING
12 YOU WON'T BE DOWN THERE DURING THE DELIBERATION; IS THAT
13 CORRECT? YOU WON'T BE IN SAN YSIDRO?

14 A. WELL, I'M SUPPOSED TO START THE 18TH OF AUGUST.
15 THE COURT: AND TODAY BEING THE 7TH.

16 BY MS. ROACH:

17 Q. SO ASSUMING THAT YOU DON'T START THAT JOB UNTIL
18 AFTER DELIBERATIONS ARE CONCLUDED IN THIS CASE, WHAT
19 SPECIFICALLY ARE YOU CONCERNED ABOUT IMPACTING THE
20 DELIBERATIONS?

21 A. WELL, IT WOULD IMPACT MY DELIBERATIONS. IN THE
22 BACK OF MY MIND, THE POTENTIAL IN THE FUTURE FOR, ~~FOR~~ AGAIN,
23 THESE TWO GENTLEMEN, OR PEOPLE WHO HAVE SEEN ME INVOLVED IN
24 THIS CASE, COMING INTO WHERE MY OFFICE IS AT THE SCHOOL, ME
25 NOT KNOWING NECESSARILY IF IT'S, YOU KNOW, WHO KNOWS WHAT
26 ABOUT -- IF THEY SAW ME IN THIS PARTICULAR CASE.

27 FOR AN EXAMPLE, IF I WERE TO REACH A VERDICT OF GUILTY,
28 AS AN EXAMPLE, AGAIN, NOT KNOWING WHAT THE SENTENCING WAS, IF

1 THAT IS WHAT HAPPENS TO THOSE GENTLEMEN, OR ANYONE ELSE WHO
2 KNOWS OF THAT, SOMEONE COMES IN, THEY RECOGNIZE ME AS A JUROR
3 WHO VOTED GUILTY, AND I WOULD FEEL -- AND NOT ME NECESSARILY
4 RECOGNIZING THEM OR NOT -- IF THEY KNEW THAT I WAS INVOLVED
5 IN THIS CASE, I WOULD -- IT WOULD BE DIFFICULT FOR ME, I
6 THINK, TO REALLY WANT TO DO MY JOB -- MY REGULAR JOB, NOT MY
7 JOB AS JUROR. SO IT'S SOME RESERVATIONS ABOUT HOW I WOULD
8 VOTE.

9 Q. AND IF YOU -- LET'S TAKE THE OPPOSITE APPROACH. IF
10 YOU WERE NOT CONVINCED BY THE EVIDENCE, IS THERE ANYTHING
11 ABOUT YOUR CONCERN THAT WOULD MAKE YOU VOTE GUILTY EVEN
12 THOUGH BY LAW YOU FELT THEY WERE NOT GUILTY?

13 A. I'M NOT SURE ABOUT THAT. I DON'T REALLY KNOW.

14 Q. SO YOU DON'T THINK YOU'D BE ABLE TO FOLLOW THE LAW?

15 A. IT'S JUST LIKE I SAID, I'M GOING TO A NEW POSITION
16 WHERE THERE'S A GREAT AMOUNT OF PUBLIC CONTACT IN AN AREA
17 WHICH, QUITE FRANKLY, IS FAIRLY CLOSE IN TERMS OF WHO KNOWS
18 WHAT, AND WHAT GOES ON. AND MY CONCERN IS, WHATEVER I DO IN
19 THIS CASE, HOWEVER IT'S JUDGED IN THIS CASE, THAT AS SOME
20 POINT, IT COULD FALL BACK ON ME BECAUSE OF WHERE I'M WORKING.

21 Q. AND SO IF YOU WERE TO FIND THAT THE EVIDENCE
22 CONVINCES YOU BEYOND A REASONABLE DOUBT, WOULD YOU THINK THAT
23 THERE'S A CHANCE THAT YOU MIGHT VOTE NOT GUILTY JUST TO AVOID
24 THAT IN THE FUTURE?

25 A. THAT COULD BE.

26 MS. ROACH: OKAY.

27 THE COURT: LET ME ASK YOU THIS QUESTION. IF RIGHT
28 NOW YOU'RE SAYING -- YOU'RE SAYING YOU'RE NOT SURE WHETHER

1 YOU CAN DO YOUR OBLIGATION AS A JUROR BECAUSE OF THAT
2 CONCERN, IF YOU WERE TO REMAIN ON THE JURY AND THEN REACH A
3 POINT WHERE YOU CAME TO THAT CONCLUSION THAT YOU CAN NO
4 LONGER DO YOUR JOB AS A JUROR BECAUSE YOUR CONCERNS HAVE NOW
5 BEEN SO GREAT IN YOUR MIND, HEIGHTENED, WOULD YOU HAVE ANY
6 TROUBLE INFORMING ME?

7 JUROR NO. 10: I WROTE THE LETTER TO INFORM YOU
8 INITIALLY BECAUSE THAT WAS AGAIN MY CONCERN. AND SO I DIDN'T
9 WANT TO LET IT LINGER AFTER THIS MORNING.

10 THE COURT: ALL RIGHT. BUT -- BUT --

11 JUROR NO. 10: SO IN MY MIND, THAT'S SHOWING MY
12 CONCERN.

13 THE COURT: RIGHT. BUT MY QUESTION IS, TO THE
14 POINT -- BECAUSE AT THIS POINT, FROM WHAT I SEE HERE, YOU'RE
15 SAYING -- I HEAR YOU SAYING THAT YOU CAN STILL DO YOUR JOB AS
16 A JUROR.

17 JUROR NO. 10: I HOPE I CAN.

18 THE COURT: AND BASE YOUR DELIBERATION SIMPLY ON
19 THE EVIDENCE AND SIMPLY ON THE LAW AS I INSTRUCT YOU,
20 CORRECT?

21 JUROR NO. 10: I HOPE I CAN DO IT, YES.

22 THE COURT: BUT IF AT SOME POINT IN THE FUTURE YOU
23 DON'T THINK YOU CAN DO THAT ANY LONGER, WOULD YOU THEN HAVE
24 ANY HESITATION ABOUT NOT LETTING ME KNOW THAT YOU CAN NO
25 LONGER DISCHARGE YOUR DUTY AS A JUROR?

26 JUROR NO. 10: I DON'T REALISTICALLY BELIEVE RIGHT
27 NOW THAT I CAN PERFORM THE JOB AS A JUROR AS IT WAS
28 ORIGINALLY STIPULATED. I THINK THAT'S ALWAYS -- YOU KNOW,

1 FROM NOW ON, I'M GOING TO BE HONEST WITH YOU, FROM NOW ON,
2 THERE'S GOING TO BE A LINGERING DOUBT IN MY MIND THAT AT SOME
3 POINT, THIS WILL, GIVEN MY POSITION WITH MY EMPLOYER, THAT
4 IT'S GOING TO COME BACK TO ME AT SOME POINT IN TIME IN SOME
5 WAY.

6 THE COURT: AND THERE'S -- IS THERE ANYTHING THAT
7 WE CAN DO TO ALLEVIATE THAT CONCERN IN TERMS OF SEALING
8 PERSONAL INFORMATION, OR ADMONISHMENTS, OR ANYTHING THAT
9 WOULD MAKE YOU FEEL COMFORTABLE TO DO YOUR JOB?

10 JUROR NO. 10: I DON'T BELIEVE SO. AGAIN, PEOPLE
11 HAVE SEEN ME HERE. WHETHER YOU SEAL THE RECORD OR NOT,
12 PEOPLE HAVE SEEN ME HERE. AND AGAIN, I HAVE -- I HAVE NO
13 KNOWLEDGE IF ANYONE ATTENDS THAT SCHOOL OR PLANS TO ATTEND
14 THAT SCHOOL, BUT AGAIN IT'S STILL IN THE BACK OF MY MIND.

15 THE COURT: OKAY. ANY FURTHER QUESTIONS?

16 MR. LEAHY: NO, YOUR HONOR. THANK YOU.

17 MR. SANCHEZ: NO, YOUR HONOR.

18 MS. ROACH: NO.

19 THE COURT: OKAY. THANK YOU. IF YOU'LL PLEASE
20 RETURN TO YOUR SEAT.

21 (WHEREUPON JUROR NO. 10 EXITED AND THE FOLLOWING
22 PROCEEDINGS WERE HELD:)

23 THE COURT: THE RECORD WILL REFLECT THAT COUNSEL
24 ARE PRESENT, JUROR NUMBER 10 HAS LEFT THE ROOM. BASED ON HIS
25 ANSWER, ESPECIALLY THE LATTER PART, IT SOUNDS LIKE HE'S NOT
26 GOING TO BE ABLE TO DO HIS JOB. DO YOU ALL AGREE?

27 MS. ROACH: YES.

28 MR. LEAHY: RELUCTANTLY, YOUR HONOR, I THINK THAT'S

1 TRUE.

2 MR. SANCHEZ: I THINK WE MIGHT KEEP HIM ON.

3 THE COURT: SO AT THIS POINT, WE'LL EXCUSE HIM, AND
4 WILL, AS I STATED BEFORE, INDICATE THAT EVERYBODY'S
5 INFORMATION WILL BE SEALED PENDING FURTHER COURT ORDER.

6 MS. ROACH: AND DO WE GO TO THE FIRST ALTERNATE?

7 MR. SANCHEZ: THE FIRST. THEY JUST GO IN ORDER.

8 THE COURT: OKAY. WE'LL GO BACK.

9 (THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT
10 IN THE PRESENCE OF THE JURY:)

11 THE COURT: ALL RIGHT. THE RECORD WILL REFLECT
12 WE'RE BACK IN THE PRESENCE OF THE JURY. COUNSEL ARE PRESENT,
13 DEFENDANTS ARE PRESENT.

14 JUROR NUMBER 10, YOU ARE EXCUSED. IF YOU'LL PLEASE
15 RETURN TO THE JURY ROOM. THANK YOU VERY MUCH.

16 AND ALTERNATE NUMBER 1, IF YOU'LL PLEASE HAVE A SEAT IN
17 NUMBER 10.

18 THE COURT: ALL RIGHT. BEFORE WE PROCEED ANY
19 FURTHER, LADIES AND GENTLEMEN, LET ME STATE TO YOU THAT ALL
20 OF YOUR NAMES AND PERSONAL INFORMATION ARE SEALED PENDING
21 FURTHER COURT ORDER, AND, THEREFORE, I WILL NOT BE REFERRING
22 TO YOU THROUGHOUT THE COURSE OF THIS TRIAL BY NAME FOR
23 PURPOSES OF THE COURT'S RECORD. YOU WILL NOW BE REFERRED TO
24 SIMPLY BY YOUR JUROR SEAT NUMBER. AND ALL COMMUNICATIONS
25 WITH THE COURT WILL BE SIGNED BY YOU BY YOUR ASSIGNED NUMBER,
26 AND NOT BY NAME. AND THEN, IN THIS REGARD, ALL PERSONAL
27 INFORMATION, ADDRESS AND SO FORTH, IS ALSO SEALED PENDING
28 FURTHER COURT ORDER. WERE THERE ANY REQUESTS AT A LATER TIME

1 BY THE ATTORNEYS TO FIND OUT ANY PERSONAL INFORMATION, THAT
2 WOULD COME TO THE COURT, AND YOU WOULD BE NOTIFIED PRIOR TO
3 AND GIVEN A CHANCE TO RESPOND PRIOR TO ANY INFORMATION BEING
4 DISCLOSED. SO YOUR INFORMATION IS NOW SEALED.

5 (FURTHER PROCEEDINGS HELD. REPORTED BUT NOT
6 TRANSCRIBED HEREIN.)

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REPORTER TRANSCRIPTS

COURT OF APPEAL -- STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA,	)	FROM SAN DIEGO COUNTY
PLAINTIFF AND RESPONDENT,	)	HON. ESTEBAN HERNANDEZ
	)	JUDGE
VS.)	
)	
JAVIER RODRIGUEZ,	)	APPEAL NO. D043198
DEFENDANT AND APPELLANT.	)	NO. SCS176087

REPORTER'S TRANSCRIPT ON APPEAL

AUGUST 4, 2003

SAN DIEGO, CALIFORNIA

VOL. I

PAGES 1 -- 36-100

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APPEARANCES:

FOR THE PLAINTIFF AND RESPONDENT: BILL LOCKYER
ATTORNEY GENERAL
STATE OF CALIFORNIA
110 WEST A STREET
SAN DIEGO, CA. 92101

FOR THE DEFENDANT AND APPELLANT: JAVIER RODRIGUEZ
IN PRO PER

REPORTED BY: IRENE PERKINS, CSR 12727

PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF,
VS.
JOSE LUIS LEON,
&
JAVIER RODRIGUEZ,
DEFENDANTS.

AUGUST 4, 2003

FOR THE PLAINTIFF: SOPHIA ROACH
DEPUTY DISTRICT ATTORNEY

FOR DEFENDANT LEON: JERRY LEAHY
ATTORNEY AT LAW

FOR DEFENDANT RODRIGUEZ: BENJAMIN SANCHEZ
ATTORNEY AT LAW

REPORTED BY: IRENE PERKINS, CSR NO. 12727
SAN DIEGO SUPERIOR COURT

1 CHULA VISTA, CALIFORNIA; AUGUST 4, 2003; 1:35 P.M.

2 (A CONFERENCE WAS HELD IN CHAMBERS, NOT REPORTED.)

3 THE COURT: CALLING THE CASE OF THE PEOPLE VERSUS
4 JOSE LEON AND JAVIER RODRIGUEZ CASE, CS176087. APPEARANCES.

5 MS. ROACH: SOPHIA ROACH ON BEHALF OF THE PEOPLE.

6 MR. SANCHEZ: BEN SANCHEZ ON BEHALF OF JAVIER
7 RODRIGUEZ, WHO'S PRESENT OUT OF CUSTODY.

8 MR. LEAHY: JERRY LEAHY ON BEHALF OF JOSE LEON.
9 JOSE'S PRESENT, YOUR HONOR.

10 THE COURT: OKAY. FIRST ORDER OF BUSINESS. WE
11 HAVE AMENDED INFORMATION. IF YOU GO AHEAD AND ARRAIGN YOUR
12 CLIENT.

13 MR. SANCHEZ: ON BEHALF OF MR. RODRIGUEZ, HIS TRUE
14 NAME APPEARS THEREON. HE'S BEEN PREVIOUSLY ADVISED OF HIS
15 CONSTITUTIONAL RIGHTS. WE'LL WAIVE FURTHER READING. ENTER A
16 PLEA OF NOT GUILTY. DENY ALL ALLEGATIONS.

17 THE COURT: THANK YOU. NOT GUILTY PLEA WILL BE
18 ENTERED. DENIAL OF ALLEGATIONS. THE COURT HAS PREVIOUSLY
19 RECEIVED A CONSTITUTIONAL RIGHTS ADVISAL FORM SIGNED BY THE
20 DEFENDANT. BAIL WILL REMAIN AS SET.

21 AND YOUR CLIENT AS WELL.

22 MR. LEAHY: JERRY LEAHY ON BEHALF OF JOSE LEON.
23 YOUR HONOR, WE RECEIVED A COPY OF THE AMENDED INFORMATION.
24 MY CLIENT'S PREVIOUSLY BEEN ADVISED OF HIS CONSTITUTIONAL
25 RIGHTS. WE'RE ASKING THAT A NOT GUILTY PLEA BE ENTERED, AND
26 DENIAL OF ALL THE ALLEGATIONS.

27 THE COURT: THANK YOU. NOT GUILTY PLEA WILL BE
28 ENTERED. DENIAL OF ALLEGATIONS. THE COURT HAS RECEIVED A

1 CONSTITUTIONAL RIGHTS ADVISAL FORM SIGNED BY THE DEFENDANT,
2 AND BAIL WILL REMAIN AS SET.

3 ALL RIGHT. NOW, INITIALLY WE WENT OVER A NUMBER OF
4 MATTERS IN CHAMBERS IN PREPARATION FOR STARTING THE TRIAL.
5 NOW, THE FIRST ORDER OF BUSINESS LOOKS LIKE IT'S AN ISSUE OF
6 TIMING. AND WE HAVE JUST BEEN INFORMED THAT WE WILL BE DARK
7 ON FRIDAY, AND COUNSEL HAD PREVIOUSLY INDICATED THAT
8 MR. LEAHY WILL BE DOING A PRELIM ON WEDNESDAY, SO WILL BE
9 UNAVAILABLE ON WEDNESDAY. AND MR. SANCHEZ WILL BE
10 UNAVAILABLE MONDAY FOR A DOCTOR'S APPOINTMENT AND ANOTHER
11 PROCEEDING IN THE AFTERNOON. SO THAT MEANS AT THIS POINT,
12 WE'RE GOING TO BE DARK THIS WEDNESDAY, THIS FRIDAY, AND NEXT
13 MONDAY. MR. SANCHEZ WERE YOU ALSO SAYING THAT YOU'RE GOING
14 TO BE UNAVAILABLE TUESDAY, OR IS THAT SOMETHING THAT CAN BE
15 PUT OFF.

16 MR. SANCHEZ: I'M GOING TO TRY, BUT I DON'T THINK
17 SO. IT'S A TRIAL THAT'S OCCURRING IN LOS ANGELES, SO I HAVE
18 A DEFENDANT IN, SO I THINK I HAVE TO BE THERE. IT'S A CIVIL
19 MATTER, BUT IT'S NOT A CRIMINAL. BUT I WILL CALL --
20 HONESTLY, I DON'T KNOW IF IT'S A JURY CASE OR NOT. IF IT'S
21 NOT I MAY BE ABLE TO DO IT IN ONE DAY.

22 THE COURT: WELL, LET'S -- WELL, FOR TIMING
23 PURPOSES, WHEN WE WERE BACK IN CHAMBERS, WE WERE TALKING
24 ABOUT TELLING THE JURY THAT THIS CASE WOULD GO THROUGH
25 THURSDAY OF NEXT WEEK. I THINK WITH THE EXTRA DAY, I THINK
26 WE SHOULD TELL THEM AT LEAST FRIDAY OF NEXT WEEK, OR DO YOU
27 THINK WE SHOULD GO BEYOND THAT IN TERMS OF ESTIMATING FOR THE
28 TRIAL. ANYBODY THINK THAT WE SHOULD TELL THEM BEYOND FRIDAY

✓:
Strike
1

1 OF NEXT WEEK?

2 MR. SANCHEZ: I DON'T THINK SO.

3 THE COURT: MR. LEAHY?

4 MR. LEAHY: NO, YOUR HONOR, I DON'T.

5 THE COURT: MS. ROACH?

6 MS. ROACH: NO.

7 THE COURT: OKAY. SO I'LL TELL THEM THAT THIS CASE
8 WILL HAVE -- WE'LL BE DARK AT LEAST THREE DAYS, AND PLAN ON
9 THIS CASE LASTING THROUGH NEXT FRIDAY. OKAY. AND WE DO --
10 MR. SANCHEZ, YOU GAVE ME THE NAME OF THE ADDITIONAL POSSIBLE
11 WITNESS, GLORIA RODRIGUEZ.

12 MR. SANCHEZ: THAT'S CORRECT.

13 THE COURT: OKAY. SO NOW, LET'S START GOING
14 THROUGH THE IN LIMINE MATTERS AND THE PEOPLE'S TRIAL BRIEF.
15 AND FOR THE RECORD, MR. RODRIGUEZ HAS NOT BEEN DRESSED OUT.
16 MR. SANCHEZ, WILL YOU PREPARE A DRESS OUT ORDER?

17 MR. SANCHEZ: YOUR HONOR, I HAD A DRESS OUT ORDER.
18 I DELIVERED CLOTHES TO THE JAIL ON SATURDAY, SO I'M NOT SURE
19 WHAT HAPPENED THERE. AND I HAVE A RECEIPT SOMEWHERE FOR THE
20 CLOTHES.

21 THE COURT: OKAY. WELL --

22 MR. SANCHEZ: BUT I DID DELIVER THEM ON SATURDAY TO
23 THE JAIL.

24 THE COURT: WELL, IN AN ABUNDANCE OF CAUTION, JUST
25 PREPARE ANOTHER ONE SO I CAN SIGN, AND THEN MAKE SURE THAT
26 HE'S DRESSED OUT FOR TOMORROW BECAUSE IT'S ALREADY 3:10, AND
27 AFTER WE GET THROUGH THESE MOTIONS, IT LOOKS LIKE WE'RE NOT
28 GOING TO BE CALLING UP THE JURY TODAY, AND ESPECIALLY IN

1 LIGHT OF THE FACT THAT HE'S NOT DRESSED OUT.

2 MR. SANCHEZ: OKAY.

3 THE COURT: OKAY. SO GOING THROUGH THE TRIAL
4 BRIEF. FIRST ISSUE -- WE'LL JUST TAKE THEM ONE BY ONE. ON
5 PAGE 2, IF THE DEFENDANTS TESTIFY THEY MAY BE IMPEACHED WITH
6 PRIOR FELONY CONVICTIONS AND TRUE FINDINGS, SPECIFICALLY
7 PEOPLE WOULD SEEK TO INTRODUCE MR. LEON'S TRUE FINDING AS A
8 JUVENILE FOR PENAL CODE SECTION 211 DATING FROM 1999, AND
9 ALSO RODRIGUEZ'S PRIOR CONVICTION OF PENAL CODE SECTION 459
10 ALSO FROM 1999. DO YOU SUBMIT ON THE DISCUSSION IN CHAMBERS,
11 OR IS THERE ANYTHING IN ADDITION THAT YOU WISH TO ADD?

12 MR. SANCHEZ: I'LL SUBMIT IT, YOUR HONOR.

13 MR. LEAHY: I'M SORRY, YOUR HONOR. WAS THIS THE
14 GANG EVIDENCE ISSUE?

15 THE COURT: NO, NO. THIS IS ONLY FOR PURPOSES OF
16 IMPEACHMENT.

17 MR. LEAHY: SUBMIT IT.

18 THE COURT: OKAY. ALL RIGHT. BASED ON PEOPLE VS.
19 CASTRO AND IT'S PROGENY, THE COURT FINDS THAT THEY WILL BE
20 PERMITTED TO BE IMPEACHED IF THEY TESTIFY. FIRST OF ALL,
21 MR. LEON WOULD BE PERMITTED TO BE IMPEACHED WITH HIS 211 TRUE
22 FINDING FROM 1999. AND MR. RODRIGUEZ WILL BE PERMITTED TO BE
23 IMPEACHED WITH HIS PRIOR CONVICTION OF PENAL CODE SECTION
24 459, AS THEY ARE BOTH CRIMES OF MORAL TURPITUDE. AND CASE
25 LAW INSTRUCTS THAT PEOPLE WHO TESTIFY ARE NOT ENTITLED TO A
26 FALSE AURA OF VERACITY IN THOSE INSTANCES. THEY DO -- THEY
27 ARE CRIMES OF MORAL TURPITUDE, SO UNDER CASTRO AND BEAGLE AND
28 THE PROGENY OF THOSE CASES, THOSE WILL BE PERMITTED FOR

1 IMPEACHMENT PURPOSES.

2 NEXT ISSUE IS CHARACTER EVIDENCE FOR IMPEACHMENT. AND
3 IT'S MY UNDERSTANDING THAT NEITHER MR. LEON NOR MR. RODRIGUEZ
4 WILL BE PRESENTING CHARACTER EVIDENCE; IS THAT CORRECT?

5 MR. LEAHY: ON BEHALF OF MR. LEON, THAT'S CORRECT.

6 MR. SANCHEZ: AND THAT'S CORRECT ON BEHALF OF
7 MR. RODRIGUEZ.

8 THE COURT: OKAY. SO THAT MAKES THAT ISSUE MOOT,
9 BECAUSE THERE'S NO NEED TO ADDRESS WHETHER THE PEOPLE CAN
10 PRESENT IMPEACHMENT CHARACTER EVIDENCE. SO THAT ISSUE
11 BECOMES MOOT. AND WE DO HAVE -- JUST OFF THE RECORD FOR A
12 MINUTE.

13 (DISCUSSION CONCERNING AN UNRELATED MATTER, NOT
14 REPORTED.)

15 THE COURT: BACK ON THE RECORD. BEFORE WE GET TO
16 THE NEXT ISSUE, WHICH IS THE 1101(B), LET ME JUMP AHEAD TO
17 WHAT'S NOTED AS THE 4TH ISSUE ON PAGE 7 OF THE PEOPLE'S
18 MOTION, WHICH HAS TO DO WITH GANG EVIDENCE UNDER PENAL CODE
19 SECTION 186.22. NOW, HERE IN THE AMENDED INFORMATION, WE
20 HAVE THE GANG ENHANCEMENT ALLEGATION, THE 186.22 ALLEGATION.
21 AND IN OUR DISCUSSION IN LIMINE, BASICALLY WE WERE TALKING
22 ABOUT WHAT CAN COME IN UNDER PROPERLY ADMITTED EVIDENCE TO
23 ESTABLISH THE GANG ENHANCEMENT. AND THE DISCUSSION, FIRST OF
24 ALL, CENTERED ON WHETHER IT COULD INCLUDE PREDICATE ACTS THAT
25 INCLUDE PRIOR CONVICTIONS OR TRUE FINDINGS OF THE DEFENDANTS.
26 AND MR. LEAHY HAD POINTED OUT HE HAD NOT ENCOUNTERED A
27 SITUATION IN THE PAST WHERE THE PREDICATE CRIME WAS A PRIOR
28 CONVICTION OF ONE OF THE DEFENDANTS.

1 AND LOOKING AT THE CASE LAW, THE PEOPLE CITE AMPLE CASE
2 LAW, A LOT OF CASES -- PEOPLE VS. OLGEIN(SIC), PEOPLE VS.
3 GOMEZ(SIC), PEOPLE VS. LOEUN, L-O-E-U-N, WHICH IS 17 CAL.4TH
4 1, AS WELL AS PEOPLE VS. ZERMENO, Z-E-R-M-E-N-O, WHICH IS 21
5 CAL.4TH 927. AND BASED ON THOSE CASES AND OTHER ADDITIONAL
6 CASES, THE PEOPLE'S POSITION IS THAT PREDICATE OFFENSES CAN
7 INCLUDE OFFENSES FOR WHICH THE DEFENDANTS HAVE EITHER HAD A
8 CONVICTION FOR A TRUE FINDING. AND THE SPECIFIC ONES THAT WE
9 WERE DISCUSSING WAS MR. LEON'S TRUE FINDING AS A JUVENILE FOR
10 THE 211. AND SO WE TOOK A BREAK, AND WE WERE LOOKING AT THE
11 CASE LAW. AND COUNSEL WAS LOOKING AT THE CASE LAW. IS THERE
12 ANYTHING, MR. LEAHY, YOU WANT TO ADD TO THAT DISCUSSION?

13 MR. LEAHY: YOUR HONOR, I DON'T -- YES, THERE IS.
14 I DON'T INDICATE -- I CANNOT INDICATE TO THE COURT THAT I
15 READ ALL OF THE CASES. HOWEVER, I WAS ABLE TO READ SOME OF
16 THEM. AND NONE OF THE CASES THAT I READ ARE CASES IN WHICH
17 THE PROSECUTION SOUGHT TO INTRODUCE A PRIOR GANG RELATED
18 CRIME OF A DEFENDANT AS ONE OF THE PREDICATE CRIMES TO
19 ESTABLISH THE GANG ENHANCEMENT.

20 INTERESTINGLY ENOUGH, THE MOST RECENT CASES WHICH ARE
21 THE ZERMENO, Z-E-R-M-E-N-O, AND THE LOEUN CASE, L-O-E-U-N. I
22 DIDN'T READ LOEUN, BUT I DID READ ZERMENO. THOSE ARE KIND OF
23 INTERESTING CASES, AT LEAST THE ONE THAT I READ, THE ZERMENO
24 CASE IS INTERESTING, AND I THINK IT'S TOTALLY MISQUOTED IN
25 THE DISTRICT ATTORNEY'S PAPERS.

26 THAT CASE WAS A CASE IN WHICH THE CRIME THAT WAS AT
27 ISSUE, THE CRIME THAT WAS BEING TRIED IN THAT CASE, THE
28 PEOPLE WERE TRYING TO ESTABLISH JUST BY USING THAT CRIME,

1 THEY WERE TRYING TO ESTABLISH TWO PREDICATE CRIMES, THAT WAS
2 WHAT THEY WERE TRYING TO DO. AND APPARENTLY, THE UNDER --
3 THE COURT BELOW WAS APPARENTLY WAS ABLE TO DO THAT. THEY
4 SAID THAT WE HAD THE INITIAL CRIME, WHICH WAS SOME TYPE OF AN
5 ASSAULT, I BELIEVE, SOME TYPE OF A FIGHT, COULD BE USED, AND
6 THEN AN AIDER AND ABETTOR WHO IS ALSO A GANG MEMBER, WHOSE
7 JOB IT WAS TO KEEP AWAY PEOPLE FROM INTERFERING IN THE FIGHT,
8 KIND OF ACTING AS THE GATEKEEPER, THAT HIS AIDING AND --
9 EXCUSE ME YOUR HONOR.

10 ?→ THE COURT: OFF THE RECORD FOR A SECOND.

11 (DISCUSSION CONCERNING AN UNRELATED MATTER. NOT
12 REPORTED.)

13 THE COURT: BACK ON THE RECORD. YOU MAY CONTINUE.

14 MR. LEAHY: THANK YOU.

15 THE COURT: SO YOU WERE DISTINGUISHING THAT CASE
16 ZERMENO.

17 MR. LEAHY: WHAT THE PROSECUTION WAS SEEKING TO DO
18 IN THAT CASE WAS TO USE THE INSTANT CRIME, WHICH I THINK THE
19 LAW SAYS CLEARLY THEY CAN USE AS TWO PREDICATE OFFENSES. THE
20 SUPREME COURT SAID, "NO, YOU CAN'T DO THAT" AND THE REASON
21 IS THAT IF ONE PERSON'S LIABILITY IS PREDICATED ON AN AIDER
22 AND ABETTOR LIABILITY, YOU DON'T HAVE TWO CRIMES. YOU ONLY
23 HAVE ONE CRIME. AND SO THEY TOLD THE COURT'S BELOW YOU CAN'T
24 DO IT.

25 NOW, THAT'S CLEARLY, IN ONCE SENSE, NOT RELEVANT AT ALL
26 TO THE ISSUE THAT IS INVOLVED IN THIS CASE, AND THAT THE
27 DISTRICT ATTORNEY IS SEEKING TO PUT BEFORE YOUR HONOR. AND
28 IT SEEMS TO ME THAT WHAT THAT COURT -- WHAT THAT CASE DOES

1 STAND FOR APPARENTLY IS THAT THE CRIME AT TRIAL, THE CRIME AT
2 ISSUE, CAN BE USED AS ONE OF THE PREDICATE CRIMES FOR THE
3 GANG ENHANCEMENT. BUT THERE'S NOTHING IN THAT CASE THAT
4 TALKS ABOUT A SITUATION LIKE WE HAVE HERE, WHICH IS, CAN WE
5 USE A FORMER CRIME OF ONE OF THE DEFENDANTS AS A PREDICATE
6 CRIME.

7 NOW, IT SEEMS TO ME THAT WE OUGHT TO BE CAREFUL IN DOING
8 THAT. IF WE'RE USING THE CRIME THAT'S AT ISSUE, FOR EXAMPLE,
9 THE CASE INVOLVING THIS AUTO BURGLARY THAT WE HAVE BEFORE
10 YOUR HONOR, ONE CAN UNDERSTAND WHY THE COURT OF APPEALS AND
11 THE SUPREME COURT MIGHT SAY, "WELL, YOU CAN USE THAT BECAUSE
12 YOU'RE GOING TO HAVE TO -- AS A PREDICATE CRIME -- BECAUSE
13 YOU'RE GOING TO HAVE TO PROVE IT UP ANYWAY. YOU'RE GOING TO
14 HAVE TO PROVE UP THE FACTS. IT'S NOT GOING TO BE PREJUDICIAL
15 TO THE DEFENDANT OTHER THAN THE NORMAL PREJUDICE THAT OCCURS
16 BECAUSE THERE ARE FACTS COMING IN THAT INDICATE THAT HE
17 COMMITTED A CRIME." AND SO I CAN UNDERSTAND WHY THAT CRIME
18 CAN SERVE THE DUAL PURPOSE OF, YOU KNOW, OBVIOUSLY THE
19 EVIDENCE SHOULD GO TOWARDS HIS GUILT, AND THE EVIDENCE CAN
20 ALSO GO TOWARDS HIS GANG INVOLVEMENT. BUT THAT'S WHAT WE
21 HAVE HERE.

22 WHAT WE HAVE HERE IS A PRIOR CRIME OF MY CLIENT, THE
23 DEFENDANT. AND ALTHOUGH THEIR ARGUMENT IS THAT WE JUST WANT
24 TO BRING THAT CRIME IN AS ON THE GANG ENHANCEMENT, IT'S ALSO
25 EXTREMELY PREJUDICIAL, AND SEEMS TO ME THAT SINCE I'VE FOUND
26 NO CASE THAT ALLOWED THAT TO BE USED AS A PREDICATE CRIME, A
27 PRIOR CRIME OF THE DEFENDANT TO BE USED AS A PREDICATE CRIME.
28 I THINK THE COURT'S GOT TO BE VERY CAUTIOUS AND VERY CAREFUL.

1 AND I THINK THAT RATHER THAN BLUR THE ANALYSIS OF THE GANG
2 ENHANCEMENT AND 1101(B), I THINK THE COURT NEEDS TO SIMPLY
3 LOOK AT 1101(B) AND SAY COULD THIS COME IN UNDER 1101(B), AND
4 THAT'S THE ANALYSIS. I WOULD ASK THE COURT TO BE VERY
5 CIRCUMSPECT AS TO WHETHER OR NOT THAT KIND OF EVIDENCE CAN
6 COME IN UNDER THE GUIDES OF THE GANG ENHANCEMENT WITHOUT SOME
7 EXPLICIT AUTHORITY THAT SAYS IT CAN COME IN.

8 NOW, THERE'S ANOTHER ARGUMENT THAT THE DISTRICT ATTORNEY
9 MADE IN CHAMBERS WHICH WAS THAT, "WELL, WHAT BETTER WAY TO
10 SHOW THAT A PERSON IS GANG INVOLVED OTHER THAN HE WAS
11 INVOLVED IN PRIOR GANG CRIMES." I DON'T THINK I CAN
12 CHALLENGE THE FACT THAT THAT MAY BE THE VERY BEST EVIDENCE
13 THAT THERE IS THAT JOSE LEON IS A GANG MEMBER, BUT THEY'RE
14 NOT GOING TO NEED IT. THEY'VE GOT, AS THE PRELIMINARY
15 EXAMINATION CLEARLY SHOWS, THEY'VE GOT INCREDIBLE AMOUNTS OF
16 EVIDENCE THAT TIES HIM WITH SAN YSIDRO. THEY'VE GOT FI'S,
17 THEY'VE GOT ADMISSIONS, THEY'VE GOT ALL KIND OF THE USUAL
18 STUFF THAT THEY NORMALLY USE. THEY'VE GOT A LOT OF EVIDENCE.
19 THEY GOT A GANG EXPERT, THEY GOT ALL OF THIS STUFF THAT'S
20 GOING TO COME IN. SO I WOULD SIMPLY SAY THE PREJUDICIAL
21 EFFECT FAR OUTWEIGHS ANY PROBATIVE VALUE THAT IT MIGHT HAVE
22 ON THE ISSUE OF WHETHER THESE WERE GANG MEMBERS AND WHETHER
23 THE GANG ENHANCEMENT SHOULD APPLY. THEY HAD NO PROBLEM AT
24 THE PRELIM ESTABLISHING IT. I DON'T ANTICIPATE THEY'RE GOING
25 TO HAVE SOME DIFFICULTY AT THE TRIAL ESTABLISHING IT. AND
26 WHY SHOULD THEY BE ALLOWED TO CIRCUMVENT THE 1101(B) RULES
27 WHICH ARE SPECIFIC STATUTES SPECIFICALLY DESIGNED TO CONTROL
28 THE ADMISSION OF PRIOR BAD ACTS. AND IT'S A VERY SERIOUS

1 ISSUE. THE STATUTE IS VERY CLEAR ON WHAT'S GOT TO BE MET
2 BEFORE IT CAN COME IN. IT'S DANGEROUS KIND OF TESTIMONY.
3 AND WHY SHOULD THE DISTRICT ATTORNEY BE ALLOWED TO CIRCUMVENT
4 ALL OF THE 1101(B) RULES AND SNEAK IT IN THROUGH THE BACK
5 DOOR, AND I WOULD ARGUE TO THE COURT THAT THAT'S IMPROPER AND
6 COURT SHOULD NOT ALLOW IT. I HAVEN'T HAD A CHANCE TO READ
7 ALL OF THE CASES PERHAPS IF THERE IS A CASE THAT TALKS ABOUT
8 THE USE OF A PARTICULAR DEFENDANT'S PRIOR CRIMES THAT COME IN
9 UNDER SOME THEORY OTHER THAN 1101(B), I WOULD LIKE TO READ
10 IT.

11 THE COURT: WELL, BEFORE YOU SIT DOWN LET ME JUST
12 ASK YOU ALSO IN REGARDS TO ANOTHER ASPECT OF OUR DISCUSSION
13 IN CHAMBERS WAS THAT YOU WERE ~~NOT~~ GOING TO BE REQUESTING A
14 402 HEARING BEFORE THE JURY COMES IN REGARDING THE GANG
15 ENHANCEMENT; IS THAT CORRECT.

16 MR. LEAHY: THAT'S CORRECT.

17 THE COURT: AND MR. SANCHEZ, IS THAT ALSO CORRECT?

18 MR. SANCHEZ: YES, IT IS, YOUR HONOR. ↗

19 THE COURT: OKAY. SO IN OTHER WORDS, YOUR BASIC
20 CHALLENGE TO THAT EVIDENCE WILL COME IN THE COURSE OF TRIAL
21 THROUGH CROSS-EXAMINATION AND SO FORTH?

22 MR. LEAHY: THAT'S CORRECT.

23 THE COURT: MR. SANCHEZ?

24 MR. SANCHEZ: THAT'S CORRECT.

25 THE COURT: AND MR. SANCHEZ IS THERE ANYTHING IN
26 ADDITION YOU WISH TO ADD IN REGARDS TO THAT LAST ISSUE
27 MR. LEAHY WAS ADDRESSING?

28 ↗ MR. SANCHEZ: NO, YOUR HONOR. I SUBMIT.

1 THE COURT: OKAY. MS. ROACH.

2 MS. ROACH: THANK YOU, YOUR HONOR. FIRST OF ALL
3 I'D LIKE TO ADDRESS MR. LEAHY'S ALLEGATION THE PROSECUTION
4 WAS MISQUOTING ZERMENO. IN FACT, THE PROSECUTION GOES AT
5 GREAT LENGTHS IN PAGE 16 AND 17 TO DESCRIBE EXACTLY WHAT
6 HAPPENS IN ZERMENO. THERE ARE NO MISQUOTES. IT'S SIMPLY PUT
7 IN THERE FOR THE CROSS-ADMISSION THAT ZERMENO NARROWED THE
8 SCOPE OF THE LOEUN DECISION.

9 IN ADDITION, IN DISCUSSING CASES THAT SPECIFICALLY ALLOW
10 A DEFENDANT'S PRIOR ACT TO BE A PREDICATE OFFENSE, WE HAVE
11 BOTH IN RE ELODIO O., THAT'S E-L-O-D-I-O, AND THEN INITIAL O,
12 AT 56 CAL.APP4TH 1174. THERE'S ALSO PEOPLE VERSUS LOEUN,
13 L-O-E-U-N, AND THAT'S AT 17 CAL.4TH 1,~~8~~BOTH OF THOSE CASES
14 ALLOWED A PROSECUTOR TO CHARGE TWO ACTS, TWO SEPARATE ACTS BY
15 A DEFENDANT, AND USE ONE OF THOSE ACTS AS A PREDICATE OFFENSE
16 IN ORDER TO PROVE THE PATTERN OF CRIMINAL GANG ACTIVITY.~~3~~ SO
17 I THINK BOTH OF THOSE CASES ARE DIRECTLY ON POINT AS TO THAT
18 ISSUE.

19 AS TO MR. LEAHY'S FOURTH ARGUMENT, HE ARGUED THAT IT IS
20 TOO PREJUDICIAL TO ADMIT THE PRIOR CRIME BECAUSE IT IS SO
21 PROBATIVE. WELL, THAT IS NOT THE DEFINITION OF PREJUDICIAL.
22 THE PROBATIVE VALUE SIGNIFICANTLY OUTWEIGHS ANY PREJUDICE
23 WHICH WOULD BE SOMETHING COMING TO THE DEFENDANT THAT'S
24 UNTOWARD OR UNWARRANTED. AND IN THIS CASE, THE REALITY IS
25 THAT THESE DEFENDANTS ARE CHARGED ON COUNTS 3 AND 4 WITH
26 CRIMES THAT HAVE AS ELEMENTS THE REQUIREMENT THAT I PROVE
27 THEY ARE GANG MEMBERS. SO ISSUES OF BIFURCATION AND
28 PREJUDICE AS TO THEIR GANG STATUS ARE REALLY MOOT. I MEAN,

1 THOSE ARE ISSUES THAT I HAVE TO PROVE UP NOT ONLY AS
2 ALLEGATIONS, BUT AS PART AND PARCEL OF THE UNDERLYING
3 CHARGES. I REALLY DON'T THINK THAT THE 352 ARGUMENT HAS ANY
4 WEIGHT WHATSOEVER WHEN YOU'RE TALKING ABOUT THE PROSECUTOR'S
5 DUTY TO PROVE AN ELEMENT TO THE OFFENSE.

6 AND THEN, FINALLY, WITH REGARD TO THE 1101(B) EVIDENCE,
7 IT IS TRUE THAT 1101(B) DOES DEFINE THE LIMITED AREAS WHERE A
8 PERSON CAN BRING IN PRIOR BAD ACTS, BUT TWO OF THOSE AREAS
9 THAT ARE WELL RECOGNIZED ARE MOTIVE AND INTENT. AND THAT'S
10 EXACTLY WHAT THE PROSECUTION IS TRYING TO DO HERE. AND WHEN
11 YOU'VE GOT A SITUATION WHERE BOTH THE ALLEGATIONS AS WELL AS
12 ELEMENTS OF THE OFFENSE REQUIRE THE PROSECUTION THEN TO
13 INTRODUCE EVIDENCE OF GANG AFFILIATION, THEN I DON'T SEE ANY
14 PREJUDICE THAT CAN ATTACH TO INTRODUCING THAT SAME TYPE OF
15 EVIDENCE UNDER 1101(b) AND MOTIVE AND INTENT. AND IN FACT, I
16 THINK BECAUSE OF THE CROSS-ADMISSIBILITY, THE BURDEN IS, IN
17 FACT, SOMEWHAT LESSENER BECAUSE THE PREJUDICE ASPECT IS VOID.
18 YOU SIMPLY GET THAT EVIDENCE IN BECAUSE IT COMES IN AS AN
19 ELEMENT AS WELL AS AN ALLEGATION.

20 THE COURT: MR. LEAHY?

21 MR. LEAHY: YOUR HONOR, PEOPLE V. LOEUN -- AND I'M
22 QUOTING HER EXACT LANGUAGE FROM HER MOVING PAPERS.

23 THE COURT: AT WHAT PAGE?

24 MR. LEAHY: I'M LOOKING AT PAGE 15 OF HER MOTION,
25 YOUR HONOR.

26 THE COURT: OKAY.

27 MR. LEAHY: SHE SAYS, "MORE SIGNIFICANTLY, THE
28 CALIFORNIA SUPREME COURT OF PEOPLE v. LOEUN HAS GIVEN ITS

1 EXPRESSED BLESSING TO THIS CONCEPT. LOEUN FOUND THE
2 PROSECUTION COULD ESTABLISH THE PREDICATE OFFENSES TO THE
3 EVIDENCE OF THE DEFENDANT'S ACTIVITY IN THE CHARGED CRIME."
4 NOW, SHE TOOK THE -- SHE JUST ARGUED THAT THIS WAS A PRIOR
5 CRIME, AND THAT SOMEHOW LOEUN WAS CONCERNED WITH A PRIOR
6 CRIME, AS SHE'S TRYING TO SAY WE CAN GET MR. LEON'S PRIOR
7 CRIME. BUT SHE QUOTES IT HERSELF. I MEAN, THAT CASE ALSO
8 CONCERNS THE CHARGED CRIME, AND I DON'T DISPUTE THAT. BUT I
9 DON'T THINK SHE'S FOUND ANY CASE LAW AT ALL THAT SAYS YOU CAN
10 USE A PRIOR CRIME OF A DEFENDANT AS ONE OF THE PREDICATE
11 CRIMES. IF SHE FINDS IT, I'D LIKE TO READ IT. BUT SHE'S NOW
12 MISQUOTING LOEUN. HER OWN MOVING PAPERS SAID IT WAS THE
13 CHARGED CRIME THAT WAS AT ISSUE THERE.

14 AND, YOUR HONOR, I HAVEN'T ADDRESSED THE 1101(B) AT ALL.
15 AND I ASSUME WE'RE GOING TO LEAVE THAT. WE'RE GOING TO DEAL
16 WITH THAT SEPARATELY. AND I'M NOT ASKING THE COURT TO MERGE
17 THE TWO ANALYSIS, AS THE DISTRICT ATTORNEY IS CLAIMING. I
18 THINK THEY ARE SEPARATE ANALYSIS. THEY HAVE TO BE DONE
19 SEPARATELY. AND I ASK THE COURT NOT TO JUMP ON SOME
20 BANDWAGON OF CROSS-ADMISSABILITY.

21 THE COURT: OKAY. MS. ROACH.

22 MS. ROACH: YOUR HONOR, JUST WITH REGARD TO LOEUN,
23 I THINK I WAS FAIRLY CLEAR THAT THOSE WERE BOTH CHARGED
24 OFFENSES. AND THE ONLY DISTINCTION THAT I CAN FIND IS THAT
25 THE COURT ACTUALLY HAS THE BENEFIT OF HAVING PRIOR
26 CONVICTIONS FOR OFFENSES THAT OCCURRED IN THE PAST. WITH
27 CHARGED OFFENSES, YOU DON'T HAVE THAT BENEFIT. SO, IN FACT,
28 I THINK THE PREJUDICE IS EVEN REDUCED BEYOND WHAT IT WOULD

1 NORMALLY BE. SO I DO THINK THAT LOEUN AND ELODIO O., BECAUSE
2 THEY DEAL WITH A DEFENDANT'S OWN ACT BEING THE PREDICATE, ARE
3 DISPOSITIVE. I DON'T THINK THEY THERE'S ANY RATIONALE WHICH
4 SUPPORTS THAT THEY'RE NOT PART OF THE CHARGED OFFENSE, THAT
5 MEANS THAT THEY CAN'T COME IN UNDER THE PREDICATE.

6 THE COURT: MR. SANCHEZ, ANYTHING?

7 MR. SANCHEZ: NO, YOUR HONOR.

8 THE COURT: LET ME JUST ASK THIS QUESTION OF THE
9 DEFENSE. DO YOU HAVE ANY CASE THAT SAYS THE OPPOSITE OF WHAT
10 THE DA IS SAYING THAT YOU CANNOT USE A PREDICATE AS A
11 PREDICATE OFFENSE, ONE FOR WHICH THE DEFENDANT HAS EITHER A
12 TRUE FINDING OR CONVICTION?

13 MR. LEAHY: NO.

14 THE COURT: MR. SANCHEZ?

15 MR. SANCHEZ: NO, I DO NOT.

16 MR. LEAHY: YOUR HONOR, BUT THE BURDEN I DON'T
17 THINK IS ON US. BUT I CERTAINLY, IF I HAVE AN OPPORTUNITY,
18 WHICH IT LOOKS LIKE I'M GOING TO HAVE SOME TIME, THEN I'LL
19 CERTAINLY DO SOME RESEARCH AND SEE IF I CAN FIND ANY. BUT
20 THE CASES THAT THE DISTRICT ATTORNEY CITES CANNOT GO TO
21 SUPPORT THE THEORY THAT MR. LEON'S PRIOR CRIME CAN BE USED AS
22 A PREDICATE CRIME. AND I THINK THE BURDEN IS ON THEM IF THEY
23 WANT TO ADVANCE THAT. BUT I DON'T HAVE ANY CASE LAW TO THE
24 CONTRARY.

25 THE COURT: OKAY. SO LET ME JUST INDICATE THIS.
26 AS WE GO THROUGH TODAY ON THESE IN LIMINE MATTERS, I'LL MAKE
27 MY INITIAL DETERMINATION, BUT I WILL LEAVE OPEN THE
28 POSSIBILITY THAT IF YOU FIND SOME ADDITIONAL AUTHORITY, YOU

1 CAN CERTAINLY RAISE THAT TOMORROW MORNING.

2 MR. LEAHY: THANK YOU, YOUR HONOR.

3 THE COURT: OKAY. SO STICKING STRICTLY WITH THE
4 FOURTH MOTION MADE BY THE PEOPLE ON PAGE -- STARTING ON PAGE
5 7, WITH REGARD TO GANG EVIDENCE BEING ADMISSIBLE PURSUANT TO
6 186.22, HERE THE COURT WILL RULE THAT THE PEOPLE WILL BE
7 PERMITTED TO USE AS PREDICATE ACTS PRIOR CONVICTIONS OR TRUE
8 FINDINGS AGAINST THE DEFENDANTS AS SOME OF THOSE PREDICATE
9 ACTS TO SHOW THE GANG ENHANCEMENT. AND THAT WILL BE IN
10 CONJUNCTION WITH AN ADMONITION AT THE TIME WITH WHICH THAT
11 EVIDENCE COMES UP THAT THAT EVIDENCE GOES SOLELY TO THE
12 ENHANCEMENT, THE GANG ENHANCEMENT.

13 MS. ROACH: YOUR HONOR, WOULD THAT ALSO BE INCLUDED
14 AS TO THE ELEMENTS OF COUNTS 3 AND 4?

15 THE COURT: AND TO THE ELEMENTS OF 3 AND 4. ONLY
16 ADMISSIBLE FOR COUNTS 3 AND 4, AND THE ENHANCEMENT.

17 OKAY. NOW, AND AS PART OF COMING TO THIS RULING, THE
18 COURT HAS ALSO WEIGHED AND CONSIDERED EVIDENCE CODE SECTION
19 352, AND FINDS THAT THE PROBATIVE VALUE OUTWEIGHS THE
20 POTENTIAL PREJUDICE, AND ESPECIALLY WITH REGARDS TO COUNTS 3
21 AND 4, ARE ELEMENTS OF THE CRIME THAT THE PEOPLE HAVE TO
22 ESTABLISH.

23 NOW, GOING BACKWARDS, SO TO SPEAK, TO THE THIRD ISSUE
24 RAISED BY THE PEOPLE IN THEIR TRIAL BRIEF, WHICH IS THE
25 1101(B) THAT BEGINS ON PAGE 4 OF THE PEOPLE'S TRIAL BRIEF.
26 NOW, HERE, THE ANALYSIS IS DIFFERENT. HERE THE CASES ARE
27 PEOPLE VS. EWOLDT 7 CAL.4TH 380, AND PEOPLE VS. BALCOLM 7
28 CAL.4TH 414. AND FIRST OF ALL, THE COURT IS LOOKING TO SEE

1 WHETHER THE EVIDENCE IS MATERIAL AND RELEVANT, THAT IT'S NOT
2 SIMPLY PROPENSITY EVIDENCE, AND ALSO LOOKING AT THE DEGREE OF
3 SIMILARITY BETWEEN THE PRIOR ACT CHARGED AND THE CURRENT
4 CRIME ALLEGED.

5 AND INITIALLY IN THE PEOPLE'S PAPERS, THE PEOPLE
6 INDICATED PAGE 4, LINES 17 THROUGH 18, THAT IT IS ADMISSIBLE
7 FOR MOTIVE, OPPORTUNITY, INTENT, PREPARATION, PLAN,
8 KNOWLEDGE, IDENTITY, ABSENCE OF MISTAKE OR ACCIDENT,
9 BASICALLY EVERYTHING UNDER 1101(B). BUT, NOW, AFTER FURTHER
10 DISCUSSION, THE PEOPLE ARE NARROWING THAT TO MOTIVE AND
11 INTENT. CLEARLY WITH REGARD TO IDENTITY, THIS IS NOT A
12 SIGNATURE CRIME. FOR EXAMPLE, FOCUSING SPECIFICALLY ON --
13 AND LET ME JUST CLARIFY HIS. ARE THE PEOPLE INDICATING BY
14 THIS DISCUSSION -- BECAUSE I THINK THE FOCUS IS PRIMARILY ON
15 DEFENDANT LEON NOT ON DEFENDANT RODRIGUEZ WITH REGARD TO HIS
16 PRIOR BURGLARY; IS THAT CORRECT?

17 MS. ROACH: THAT'S CORRECT, YOUR HONOR.

18 THE COURT: AND THE PEOPLE ARE NOT ASSERTING THAT
19 THE PRIOR BURGLARIES ON RODRIGUEZ IS IN FURTHERANCE OF ANY
20 CRIMINAL STREET ACTIVITY?

21 MS. ROACH: NOT IN THE SAME SENSE THAT THERE'S A
22 GROUP OF GANG MEMBERS WHO ARE GOING IN TO COMMIT A CRIME.
23 MR. RODRIGUEZ'S BURGLARY, BECAUSE IT IS ONE OF THE PREDICATED
24 OFFENSES, AND HE WAS A DOCUMENTED GANG MEMBER AT THE TIME,
25 CAN BE USED AS A PREDICATE UNDER THE CURRENT CASE LAW. BUT
26 IN MY MIND, THERE'S A DISTINCTION BETWEEN THAT AND THE TYPE
27 OF INTENT AND MOTIVE THAT ARE SHOWN IN MR. LEON'S PRIOR WHERE
28 HE WAS CLEARLY AIDING AND ABETTING OTHER GANG MEMBERS. I

1 DON'T THINK THAT MR. LEON'S -- I'M SORRY -- MR. RODRIGUEZ'S
2 PRIOR IS ADMISSIBLE UNDER 1101(B), BUT I DO THINK THAT
3 MR. LEON'S IS. *why didn't my attorney argue this? 1101(B)*

4 THE COURT: OKAY. SO FOR OUR DISCUSSION, WE'RE
5 FOCUSING ON MR. LEON'S PRIOR 211, AND THAT'S THE FOCUS OF
6 THIS DISCUSSION. SO, AGAIN, IDENTITY, THIS NOT THE SIGNATURE
7 CRIME. THE PRIOR 211, AS I UNDERSTAND THE OFFER OF PROOF, IS
8 THAT IT WAS MR. LEON AND TWO OTHER INDIVIDUALS WHO WERE ALSO
9 MEMBERS OF THE SAME GANG WHO CONFRONTED SOMEONE THAT TOOK
10 PROPERTY FROM THEM, CORRECT?

11 MS. ROACH: THAT IS CORRECT, YOUR HONOR. I THINK
12 THERE WERE THREE INDIVIDUALS ASIDE FROM MR. LEON.

13 THE COURT: OKAY. SO A TOTAL OF FOUR?

14 MS. ROACH: YES.

15 THE COURT: ALL RIGHT. AND THEN THE INSTANT
16 OFFENSE, AS THE OFFER OF PROOF BY THE PEOPLE, IS THAT IT WAS
17 A SITUATION OF A CAR BURGLARY BEING INTERRUPTED BY SOME
18 CIVILIANS WHO CAME UP ON IT, AND AT THAT POINT, THE CIVILIANS
19 WERE THREATENING TO CALL THE POLICE, AND THEN THERE WAS A
20 GUNSHOT TO SCARE THEM OFF, AND THEN MR. LEON AND
21 MR. RODRIGUEZ LEFT IN A CAR. AND THEN AFTERWARDS, THEY WERE
22 PULLED OVER AND THERE WAS A SHORT FOOT PURSUIT.

23 AND WITH REGARD TO THE RELEVANT ASPECTS HERE, WITH
24 REGARD TO INTENT, NOW, INTENT, IN TERMS OF THE DIFFERENT
25 ANALYSIS, REQUIRES THE LEAST DEGREE OF SIMILARITY, BECAUSE
26 SIMILAR INTENT CAN BE INFERRED FROM SIMILAR ACTS IF A PRIOR
27 THEFT-RELATED OFFENSES, BUT IT'S A VERY DIFFERENT THEFT-TYPE
28 OF OFFENSE. THE FIRST ONE, THE 211(B) FROM AN INDIVIDUAL,

1 AND THE INSTANT ONE BEING OF A CAR.

2 WITH REGARD TO MOTIVE, I TAKE IT THE PEOPLE'S POSITION
3 IS THAT THIS CRIME IS FOR THE BENEFIT OF THE STREET GANG.
4 GOING INTO MOTIVE, THAT WOULD REQUIRE A HIGHER DEGREE OF
5 SIMILARITY THAN FOR INTENT. IT GOES TO MORE LIKE A COMMON
6 PLAN. AND HERE, THERE NEEDS TO BE COMMON FEATURES SUCH THAT
7 AN INFERENCE CAN BE DRAWN THAT THE DEFENDANT WHO COMMITTED
8 THE PRIOR WOULD ALSO COMMIT THE CURRENT ACT. SO THE DEGREE
9 OF SIMILARITY HAS TO BE HIGHER THAN FOR INTENT, NOT AS HIGH
10 AS FOR IDENTIFICATION. BUT HERE I THINK IT'S VERY CLEAR IT'S
11 NOT A SIGNATURE CRIME, AND I DON'T THINK THE PEOPLE ARE
12 ARGUING THAT. SO WITH REGARD TO MOTIVE AND INTENT, LET ME
13 FIRST GET THE PEOPLE'S SPECIFIC POSITION AS TO MOTIVE AND
14 INTENT UNDER 1101(B).

15 MS. ROACH: THANK YOU, YOUR HONOR. YOUR HONOR, I
16 THINK THAT THE MOTIVE IN BOTH CASES IS TO STEAL. IT'S FOR
17 PROFIT. IN ADDITION, THE OTHER MOTIVE IS TO ASSIST, TO AID
18 AND ABET A FELLOW GANG MEMBER. SO THERE'S ACTUALLY TWO
19 SEPARATE MOTIVES WHICH I THINK FORM THE BASIS FOR THIS CRIME.
20 AND MOTIVE IS REALLY SIMPLY PART IN PARCEL OF INTENT. WHAT
21 YOU'RE DRIVEN BY IN SOME WAY MAKES YOUR INTENT WHAT IT IS.
22 IS YOUR INTENT TO AID AND ABET? IS YOUR INTENT TO STEAL?
23 THAT TYPE OF THING.

24 I WOULD NOTE THAT IN THE FIRST OFFENSE, THERE WAS A
25 THEFT. IT INVOLVED SIDRO GANG MEMBERS WHICH I THINK IS
26 IMPORTANT BECAUSE IT IS A STRONG SIMILARITY BETWEEN BOTH OF
27 THE OFFENSES. IT INVOLVED ACCOSTING AN INDIVIDUAL, WHICH IS
28 DIFFERENT OBVIOUSLY THAN THE INSTANT CASE IN SOME REGARDS,

1 BUT THE ITEMS THAT WERE STOLEN WERE SIMILAR -- CREDIT CARDS,
2 PHONE CARDS, THINGS OUT OF THIS INDIVIDUAL'S WALLET. IN THE
3 CURRENT OFFENSE, SIMILAR THINGS WERE TAKEN -- IDENTIFICATION
4 CARD, SHELL GAS STATION CARD, CLEARLY THE TYPES IF ITEMS THAT
5 WERE TAKEN WERE ITEMS THAT WERE DESIGNED TO MAKE A FINANCIAL
6 GAIN FOR THE INDIVIDUALS INVOLVED IN THE CRIME.

7 ALSO, IN BOTH OF THE CRIMES, A WEAPON WAS USED. IN THE
8 FIRST CRIME, A SCREWDRIVER WAS USED. IN THE SECOND CRIME, A
9 FIREARM WAS USED. I THINK THE FACT THAT THERE WAS ARMING BY
10 ONE OF THESE GANG MEMBERS DURING EACH OF THE CRIMES IS
11 IMPORTANT. WE CAN LOOK AT SPECIFICS AS FAR AS IT BEING A
12 STRONG ARM ROBBERY -- OR AN ARMED ROBBERY VERSUS A VEHICLE
13 BURGLARY ON THE FACE I THINK THAT THEY SEEM QUITE DIFFERENT.
14 BUT THE FACT IS THAT AS SOON AS WITNESSES WERE WILLING TO
15 STEP IN TO TRY AND DEFEND THE PROPERTY, THE TWO DEFENDANTS
16 WERE WILLING TO USE FORCE IN ORDER TO RETAIN THE PROPERTY. I
17 THINK THAT THAT IS ALSO A SIMILARITY.

18 I THINK THAT THE USE OF FORCE TO TAKE PROPERTY IS
19 UNUSUAL ENOUGH IN ITSELF THAT THE COURT SHOULD LOOK AT THE
20 FACT THAT IT WAS REALLY USED IN BOTH CASES AS BEING A
21 STRIKING SIMILARITY, AND NOT JUST A DIFFERENCE BETWEEN THEM
22 BECAUSE THE FORCE WAS USED DIRECTLY ON A PERSON IN THE OTHER
23 AND ONLY AFTER THE TAKING IN THE SECOND CRIME.

24 THE COURT: OKAY. MR. LEAHY.

25 MR. LEAHY: THANK YOU, YOUR HONOR. WELL, I GUESS
26 ANY TWO CRIMES HAVE SOME SIMILARITIES. USUALLY THE CRIMINALS
27 IN BOTH CASES WEAR SHOES. SO THAT MAKES THEM SIMILAR, AND
28 THAT'S ESSENTIALLY WHAT THE DISTRICT ATTORNEY IS TRYING TO

Argue NLIC
e.g. 1/2
c.s. 1/2
Discharging A
firearm...

1 ARGUE HERE.

2 YOUR HONOR, I THINK IT'S IMPORTANT TO TAKE A LOOK AT THE
3 FACTS OF THE CURRENT CRIME. THERE IS NO ALLEGATION, AND
4 THERE WILL BE NO EVIDENCE THAT JOSE LEON SHOT A WEAPON.
5 THERE WILL BE NO EVIDENCE THAT HE USED A WEAPON IN THE
6 COMMISSION OF THIS AUTO BURGLARY, NOR WAS HE THE ONE -- THERE
7 WILL BE NO EVIDENCE THAT HE WAS THE ONE THAT ALLEGEDLY SHOT
8 THE WEAPON TO INTIMIDATE A WITNESS.

9 THERE WILL BE EVIDENCE THAT AFTER MR. LEON AND HIS
10 ASSOCIATE LEFT THE SCENE, HAD DRIVEN SOME DISTANCE AWAY, THAT
11 THE VEHICLE THAT THEY WERE IN WAS STOPPED BY THE POLICE. AND
12 THAT WHEN IT WAS STOPPED, MR. LEON, WHO WAS THE PASSENGER,
13 EXITED THE VEHICLE. HE WAS LOCATED -- HE WAS ARRESTED --
14 CONTACTED A SHORT DISTANCE AWAY, AND A .22-CALIBER WEAPON WAS
15 FOUND IN HIS PANTS. HE NEVER DREW IT. HE NEVER THREATENED
16 ANYBODY WITH IT. AS A MATTER OF FACT, WHEN HE WAS ARRESTED,
17 HE INDICATED TO THE OFFICERS -- HIS HANDS WERE IMMOBILE. HE
18 COULDN'T MOVE HIS HANDS -- BUT HE INDICATED WITH HIS HEAD
19 WHERE THIS WEAPON WAS. THEY SAID, "DO YOU HAVE ANY WEAPONS?"
20 AND HE BASICALLY INDICATED BY NODDING WHERE IT WAS. SO HE
21 GAVE IT UP.

22 NOW, THE PRIOR CRIME, ALLEGEDLY -- AND I HAVEN'T PULLED
23 MY FILE. I REPRESENTED MR. LEON IN THAT CRIME, SO I'VE GOT
24 THE POLICE REPORTS, BUT I HAVEN'T HAD A CHANCE TO LOOK AT
25 THEM. BUT I'LL JUST ASSUME THAT FACTS ARE AS THE COURTS
26 UNDERSTANDS THEM, AND AS THE DISTRICT ATTORNEY UNDERSTANDS
27 THEM. MR. LEON IS NOT GOING TO BE FOUND RESPONSIBLE FOR
28 INTIMIDATING A WITNESS BECAUSE OF ANYTHING HE AFFIRMATIVELY

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1 DID. HE MAY HAVE BEEN INVOLVED IN A ROBBERY WITH A COUPLE OF
2 OTHER PEOPLE. HE MAY -- I DON'T KNOW -- I DON'T RECALL NOW
3 EXACTLY WHAT HIS INVOLVEMENT WAS IN THAT. BUT IT WAS
4 CLEARLY, HE WASN'T -- I DON'T THINK THAT WAS AN AIDING AND
5 ABETTING CASE. I WOULD BE INTERESTED TO KNOW IF IT WAS. BUT
6 I DON'T REMEMBER NOW WHAT THE BASIS OF HIS LIABILITY WAS IN
7 THAT CASE.

8 BUT IN THIS CASE, IF HE'S RESPONSIBLE FOR INTIMIDATING A
9 WITNESS, IT'S NOT BECAUSE OF ANYTHING HE DID, IT'S GOING TO
10 BE BECAUSE OF A COUPLE OF LEGAL THEORIES. IT'S GOING TO BE
11 BECAUSE OF THE REASONABLE AND PROBABLE CONSEQUENCES THEORY
12 AND THE APPLICATION OF THAT THEORY. AND IT'S GOING TO BE AS
13 A -- WHICH IS A SUBDIVISION OF THE OVERALL AIDING AND
14 ABETTING THEORY. THAT'S WHAT THEY'RE GOING TO SAY. SO THE
15 CRIMES ARE SUBSTANTIALLY DIFFERENT. WHETHER CREDIT CARDS ARE
16 TAKEN IN THE ONE CRIME OR CREDIT CARDS WERE TAKEN IN BOTH THE
17 CRIMES IS TOTALLY IRRELEVANT. YOU DON'T GET TO USE
18 SIMILARITY OF PROPERTY TAKEN OR IT MIGHT HAVE BEEN A DOLLAR
19 BILL IN THE ONE CASE AND A DOLLAR BILL IN THE SECOND CASE AND
20 THAT NOT SUFFICIENT TO SAY THAT THEY ARE SO SIMILAR THAT YOU
21 GET TO BRING THEM IN UNDER 1101(B), AND THAT'S REALLY WHAT
22 SHE'S ARGUING.

23 MR. LEON DIDN'T THREATEN ANYONE. MR. LEON DIDN'T FIRE A
24 WEAPON. MR. LEON DIDN'T DISPLAY A WEAPON. MR. LEON HAD NO
25 DIRECT INVOLVEMENT IN THAT CRIME. AND I DON'T BELIEVE THAT
26 UNDER 1101(B) IT'S SUFFICIENT TO SIMPLY SAY THAT, "WELL, THEY
27 WERE BOTH GANG CRIMES." I DON'T THINK THAT SATISFIES, BY
28 ITSELF, THE RULES UNDER 1101(B). THERE'S REALLY NO

Prejudicial To
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1 SIMILARITY BETWEEN WHAT MR. LEON DID IN THIS CASE, AND WHAT
2 HE ALLEGEDLY DID IN THE OTHER CASE.

3 SO THAT'S, WITHOUT HAVING REALLY DONE ANY SUFFICIENT
4 RESEARCH ON IT, THAT'S OFF THE TOP OF MY HEAD, YOUR HONOR. I
5 DON'T SEE THAT THIS COMES WITHIN 1101(B).

6 THE COURT: OKAY. MR. SANCHEZ?

7 *incompetent* MR. SANCHEZ: I DON'T HAVE ANYTHING TO ADD TO THAT,
8 YOUR HONOR.

9 THE COURT: OKAY. ANYTHING FURTHER, MS. ROACH?

10 MS. ROACH: NO, YOUR HONOR.

11 THE COURT: OKAY. IN GOING THROUGH CASE LAW ON
12 1101(B), INVOLVED IN BALCOLM, ALSO CONSIDERING THE ISSUES FOR
13 WHICH THE PEOPLE ARE SEEKING TO INTRODUCE AS MOTIVE AND
14 INTENT, AND ALSO FACTORING IN EVIDENCE CODE SECTION 352, THE
15 COURT SEES THE EVIDENCE IN THIS AREA AS LENDING MORE TOWARDS
16 PROPENSITY EVIDENCE, AND WILL RULE THAT IT WILL BE EXCLUDED
17 UNDER 1101(B).

18 *AND* SO TO RECAP, THE EVIDENCE OF THE PRIORS WILL BE
19 ADMITTED WITH REGARD TO THE GANG ENHANCEMENT, INCLUDING THE
20 PREDICATE ACTS, AND WITH REGARDS TO COUNTS 3 AND 4. AND THE
21 JURY WILL BE SPECIFICALLY ADMONISHED THAT IT IS ONLY
22 ADMISSIBLE FOR COUNTS 3 AND 4, AND THE 186.22 ENHANCEMENT.
23 BUT IT WILL NOT BE PERMITTED TO BE USED AS SUBSTITUTIVE
24 EVIDENCE TO THE UNDERLINED OFFENSES OTHER THAN COUNTS 3 AND
25 FOUR BECAUSE 3 AND 4 INVOLVE THE GANG ASPECT OF IT.

26 OKAY. NOW, NEXT WE HAVE THE ISSUE OF BIFURCATION OF THE
27 STRIKE PRIOR. THAT WAS DISCUSSED IN CHAMBERS. AND IN THAT
28 REGARD, THE PEOPLE WERE ASKING WHETHER THE JURY IS GOING TO

*shd. hv. mvd. A.
severence?*

1 BE WAIVED ON THAT. OTHERWISE, THEY ARE REQUESTING TO BE ABLE
2 TO VOIR DIRE THE JURY WITH REGARD TO THAT. MR. SANCHEZ.

3 MR. SANCHEZ: YOUR HONOR, THEY JUST BROUGHT
4 MR. RODRIGUEZ OUT, AND I HAVEN'T HAD THE OPPORTUNITY TO
5 DISCUSS WITH HIM OR EXPLAIN TO HIM THE OPTIONS HE HAS WITH
6 RESPECT TO HOW THE PRIOR IS DECIDED.

7 THE COURT: OKAY. WHY DON'T YOU JUST TAKE A MOMENT
8 AND TALK WITH HIM.

9 MR. SANCHEZ: ALL RIGHT. I WILL DO THAT. BUT
10 SINCE WE'RE NOT GOING TO HAVE A JURY HERE TODAY ANYWAY, I'LL
11 CERTAINLY MAKE SURE THAT HE UNDERSTANDS IT BY TOMORROW
12 MORNING. BUT I CAN TALK WITH HIM NOW.

13 (COUNSEL AND THE DEFENDANT CONFER.)

14 ? MR. SANCHEZ: YOUR HONOR, MR. RODRIGUEZ IS WILLING
15 TO WAIVE HIS RIGHT TO HAVE THE JURY DECIDE ON THE PRIOR AND
16 HAVE THE COURT MAKE THAT DETERMINATION.

Not advised?

17 THE COURT: OKAY. ALL RIGHT. AND FOR THE RECORD,
18 MR. RODRIGUEZ, DO YOU WAIVE YOUR RIGHT TO A JURY TRIAL ON THE
19 ISSUE OF YOUR STRIKE PRIOR?

20 DEFENDANT RODRIGUEZ: YES, YOUR HONOR.

21 THE COURT: OKAY. AND THAT DECISION WAS MADE AFTER
22 HAVING CONSULTED WITH YOUR ATTORNEY ABOUT YOUR RIGHTS IN THAT
23 REGARD AND POTENTIAL DEFENSES THAT YOU COULD RAISE IN FRONT
24 OF A JURY IN REGARDS TO THAT; IS THAT CORRECT?

25 DEFENDANT RODRIGUEZ: YES, YOUR HONOR.

26 THE COURT: OKAY. AND SO I TAKE IT THEN THAT AT
27 THE END OF THE CASE, ASSUMING -- WELL, WOULD HE BE ADMITTING
28 IT UP FRONT OR JUST AT THE END IN THE EVENT OF A --

1 MR. SANCHEZ: IN THE EVENT OF A CONVICTION, YOUR
2 HONOR, HE WOULD ALLOW THE COURT TO MAKE A DETERMINATION.

3 THE COURT: IT WOULD BE A COURT TRIAL THEN AT THE
4 END?

5 MR. SANCHEZ: YES.

6 THE COURT: OKAY. ALL RIGHT. AND SO WE WILL MAKE
7 A NOTE OF THAT, THAT WITH REGARD TO THE STRIKE PRIOR, THE
8 JURY TRIAL WAS WAIVED, AND IT WOULD BE A COURT TRIAL AT THAT
9 POINT IN THE EVENT OF A CONVICTION.

10 NOW, THE NEXT ISSUE IS ADMISSABILITY OF THE 911 TAPE.
11 AND, I BELIEVE, IN OUR DISCUSSIONS BOTH COUNSEL WERE WILLING
12 TO STIPULATE TO THAT; IS THAT CORRECT?

13 MS. ROACH: YES, YOUR HONOR.

14 MR. SANCHEZ: YES, I BELIEVE WE WERE WILLING TO
15 STIPULATE TO THEIR AUTHENTICITY, YES.

16 THE COURT: OKAY. ALL RIGHT. STIPULATION IS
17 ACCEPTED.

18 MS. ROACH: SO YOUR HONOR, WITH REGARD TO
19 AUTHENTICITY, THAT'S OBVIOUSLY ONE ISSUE. WITH REGARD TO
20 ADMISSIBILITY --

21 THE COURT: DO COUNSEL STIPULATE TO ADMISSABILITY
22 OF THE 911 TAPE?

23 MR. SANCHEZ: WELL, I --

24 MR. LEAHY: YOUR HONOR, I THINK THAT --

25 MR. SANCHEZ: -- I DON'T KNOW WHY THE WHOLE TAPE
26 NEEDS TO BE INTRODUCED. I'M NOT SURE -- WE'RE GOING TO HAVE
27 THE PEOPLE THAT SPOKE ON THE TAPE TESTIFY.

28 THE COURT: WELL, THE PEOPLE'S MOTION AT PAGES 23

1 AND FOLLOWING INDICATE THE THEORY THAT IT'S A SPONTANEOUS
2 STATEMENT AT THE TIME OF THE EVENT THAT ADDRESSES THE EVENT
3 ITSELF.

4 MR. SANCHEZ: WELL, THE WITNESSES WILL BE ON THE
5 STAND TO TESTIFY TO THOSE THINGS. I MEAN, IF THEY'RE
6 SPONTANEOUS STATEMENTS, THEN OF COURSE THEY'RE ADMISSIBLE.
7 IF THE COURT FIND THEY'RE SPONTANEOUS, THEY'RE ADMISSIBLE.
8 BUT WILL THE COURT NEED TO KNOW -- WOULD THE COURT NEED A
9 FOUNDATION TO MAKE THAT DETERMINATION PRIOR TO HEARING THE
10 TAPE?

11 THE COURT: THE FOUNDATION WITH REGARD TO --

12 MR. SANCHEZ: WHETHER IT'S A SPONTANEOUS STATEMENT
13 OR NOT.

*Rescued by
Leahy*

14 THE COURT: MR. LEAHY.

15 MR. LEAHY: YOUR HONOR, I THINK THAT WHAT
16 MR. SANCHEZ IS SUGGESTING IS THAT WE WILL STIPULATE TO THE
17 AUTHENTICITY OF IT AND THE CHAIN OF CUSTODY AND ALL OF THAT.
18 BUT WHETHER IT'S A SPONTANEOUS DECLARATION, I THINK THE COURT
19 IS GOING TO HAVE TO MAKE THAT DETERMINATION.

20 THE COURT: OKAY. AND MS. ROACH.

21 MR. SANCHEZ: RATHER THAN JUST PLAY THE TAPE.

22 MS. ROACH: YOUR HONOR, I DON'T KNOW. IT COULD
23 PROBABLY BE RESOLVED WITHOUT PLAYING THE TAPE IF COUNSEL
24 AGREES THAT MY REPRESENTATIONS REGARDING THE TAPE ARE
25 ACCURATE AS DESCRIBED IN THE BRIEF WHICH IS THAT THERE IS A
26 WITNESS ON THE PHONE TALKING AS THIS INCIDENT IS OCCURRING.
27 IF YOU PREFER TO HAVE ME BRING IN THE TAPE TO ESTABLISH THAT,
28 I COULD CERTAINLY DO THAT. WE HAVE A TRANSCRIPT AS WELL AS

1 THE TAPE. BUT I THINK IT'S FAIRLY OBVIOUS FROM THE TAPE THAT
2 SHE'S SPEAKING WHILE IT'S HAPPENING.

3 MR. SANCHEZ: WE CAN MAKE A STIPULATION AS TO WHAT
4 THE DA WANTS TO OFFER. I DON'T KNOW WHAT YOU WANT TO OFFER
5 YET. I HAVEN'T READ THAT PORTION OF YOUR BRIEF. BUT IT'S
6 POSSIBLE ONCE WE DISCUSS THAT, THAT WE CAN STIPULATE TO THAT.

7 MS. ROACH: THE PEOPLE ARE OFFERING THE ENTIRE
8 TAPE. IT'S FAIRLY BRIEF.

9 THE COURT: OKAY. BUT DO COUNSEL STIPULATE TO THE
10 FACTUAL BASIS OF THE FACT THAT THE PERSON ON THE TAPE MADE
11 THE TAPE CONTEMPORANEOUS WITH THE EVENTS THAT ARE BEING
12 DISCUSSED ON THE TAPE?

13 1. MR. SANCHEZ: YES, I BELIEVE THAT'S CORRECT. I
14 HAVE NO PROBLEM WITH THAT.

15 THE COURT: AND MR. LEAHY?

16 MR. LEAHY: YOUR HONOR, COULD WE DEFER THAT UNTIL
17 TOMORROW?

18 THE COURT: LET ME SEE. DO YOU HAVE A COPY OF THE
19 TRANSCRIPT WITH YOU?

20 MS. ROACH: I CAN GO GET ONE FROM MY OFFICE IF I
21 CAN JUST ABOUT 5 MINUTES.

22 THE COURT: DO YOU HAVE EXTRA COPIES OF IT?

23 MS. ROACH: I CAN MAKE A COPY OF IT. IT'S IN THE
24 PROCESS OF BEING CORRECTED, SO IT'S GOT SOME HANDWRITTEN
25 NOTES ON IT.

26 THE COURT: OKAY. IT WILL TAKE JUST A COUPLE OF
27 MINUTES?

28 MS. ROACH: IT WON'T TAKE LONG AT ALL. AND IF THE

1 COURT WOULD LIKE, I'LL ALSO BRING IN THE TAPE.

2 THE COURT: ALL RIGHT. THE RECORD WILL REFLECT
3 COUNSEL IS PRESENT, DEFENDANT IS PRESENT. THE PEOPLE HAVE
4 BROUGHT IN THE 911 TAPE AND THE TRANSCRIPT OF IT. AND AT
5 THIS TIME SHE WILL PLAY IT. COUNSEL STIPULATE THAT REPORTER
6 NEED NOT HAVE TO TAKE DOWN THE TAPE, AND WE CAN SIMPLY READ
7 ALONG WITH THE TRANSCRIPT?

8 MR. SANCHEZ: I STIPULATE, YOUR HONOR, ON BEHALF OF
9 MR. RODRIGUEZ.

10 MR. LEAHY: SO STIPULATED, YOUR HONOR.

11 THE COURT: OKAY.

12 MS. ROACH: SO STIPULATED.

13 THE COURT: ALL RIGHT. YOU MAY PLAY THE TAPE.

14 (911 AUDIOTAPE WAS PLAYED, NOT REPORTED.

15 THE COURT: FOR THE RECORD, WE HAVE LISTENED TO THE
16 TAPE AND FOLLOWED ALONG WITH THE TRANSCRIPT. AND SO THE
17 PEOPLE'S POSITION IN THE TRIAL BRIEF IS THAT IT'S ADMISSIBLE
18 AS A SPONTANEOUS STATEMENT THAT WAS MADE UNDER THE STRESS AND
19 THE EXCITEMENT WITH NO OPPORTUNITY TO REFLECT. AND
20 MR. LEAHY.

21 MR. LEAHY: YOUR HONOR, I THINK TAKING BOTH OF
22 THESE TAPES TOGETHER, WE'VE GOT THREE SPEAKERS. WE'VE GOT
23 THE BROTHER AND THE SISTER ON THE FIRST ONE, AND WE'VE GOT
24 THE VICTIM OF A CAR BURGLARY IN THE LAST ONE. THE LAST ONE,
25 I THINK, IS THE EASIEST ONE TO DEAL WITH BECAUSE APPARENTLY
26 SHE DIDN'T SEE ANYTHING. SHE SIMPLY SAYS, "SOMEBODY CAME TO
27 MY DOOR AND SAYS THEY'RE BREAKING INTO MY CAR." SO I DON'T
28 THINK THAT COMES WITHIN ANY SPONTANEOUS DECLARATION EXCEPTION

1 TO THE HEARSAY RULE BECAUSE SHE'S NOT REPORTING ANYTHING THAT
2 SHE HERSELF ALLEGEDLY SAW.

3 AND I THINK THE SAME CAN BE -- STATEMENT CAN BE MADE
4 WITH REGARD TO THE FEMALE NARRATOR ON THE LENGTHIER -- THE
5 FIRST 911 CALL BECAUSE SHE APPARENTLY AGAIN DIDN'T SEE
6 ANYTHING. SHE'S RELATING INFORMATION THAT APPARENTLY HER
7 BROTHER IS TELLING HER. AND I WOULD ASK THE COURT TO LOOK AT
8 EACH AND EVERY ONE OF THE STATEMENTS THAT SHE ALLEGEDLY MADE.
9 AND IT APPEARS THAT SHE IS NEVER REPORTING ANYTHING THAT SHE
10 SAW. SHE'S NOT GIVING A NARRATION OF ANYTHING THAT SHE IS
11 CURRENTLY SEEING OR THAT SHE'S -- OR RECOUNTING SOMETHING
12 THAT SHE HAS PREVIOUSLY SEEN. SHE'S SIMPLY RELATING WHAT HER
13 BROTHER IS SAYING.

14 SO I THINK IF WE GO -- THE ONLY PERSON APPARENTLY WHO
15 SAW ANYTHING WHO WOULD QUALIFY AS A SPONTANEOUS DECLARATION
16 WOULD BE THE BROTHER. AND I THINK THERE'S A SERIOUS QUESTION
17 IN HERE AS TO EXACTLY WHAT HE SAW. HE GIVES CONTRADICTORY
18 STATEMENTS ABOUT THE WHITE JACKET, THE BLACK JACKET. HE
19 SAYS, "THEY SHOT AT THE APARTMENT BUILDING." "NO, THEY SHOT
20 UP IN THE AIR." "DID HE SHOOT AT YOU?" "NO, THEY DIDN'T
21 SHOOT AT ME." "YES, THEY SHOT AT ME." I MEAN, HE'S ALL OVER
22 THE PLACE IN HIS STATEMENTS.

23 SO I THINK THAT BEFORE HIS STATEMENTS CAN COME IN --
24 FIRST OF ALL, I THINK WE GOT A FOUNDATIONAL QUESTION. IT
25 APPEARS, I SHOULD SAY, THAT HE'S THE ONE WHO IS MAKING THE
26 STATEMENTS IN THE BACKGROUND THAT HIS SISTER, I TAKE IT, IS
27 RELATING OVER THE PHONE. BUT MAYBE THAT ISN'T EVEN TRUE.
28 MAYBE WE'VE GOT SOME OTHER SPEAKER THAT WE'RE NOT AWARE OF,

1 SOME OTHER PERSON WHO'S THIS UNIDENTIFIED VOICE. SO I THINK
2 BEFORE WE GO MUCH FURTHER, WE'RE GOING TO NEED TO HAVE THAT
3 PERSON COME IN AND TELL US WHAT HE, IN FACT, SAW BEFORE ANY
4 OF THE STATEMENTS OF THE SISTER, OR ANY OF THE STATEMENTS
5 FROM THE BACKGROUND CAN BE ALLOWED TO COME IN.

6 I DON'T THINK SHE HAS ANY -- I DON'T THINK THERE'S ANY
7 EXCEPTION TO THE HEARSAY RULE, SPONTANEOUS DECLARATION OR
8 OTHERWISE, WHERE SHE WOULD BE ABLE TO TESTIFY AS TO WHAT HER
9 BROTHER WAS WATCHING. THE BROTHER MIGHT BE ABLE TO HAVE A
10 HEARSAY EXCEPTION UNDER THE SPONTANEOUS DECLARATION RULE, BUT
11 APPARENTLY SHE DOES NOT. SO I THINK WE HAVE SERIOUS
12 FOUNDATIONAL ISSUES, AND WE'RE GOING TO NEED THE BROTHER AND
13 SISTER TO COME IN AND TRY TO SORT THIS OUT FOR US.

14 THE COURT: MR. SANCHEZ.

15 MR. SANCHEZ: WELL, I CONCUR, YOUR HONOR. CLEARLY
16 THE PURPOSE OF SPONTANEOUS DECLARATION IS ITS AUTHENTICITY
17 BECAUSE IT'S SOMETHING THAT SOMEBODY HAS SAW BECAUSE OF THE
18 SUDDEN NATURE OF WHAT HAS OCCURRED, AND THEY SAW IT, AND
19 THERE'S AN ACCURACY THERE. BUT CLEARLY, THERE'S NO ACCURACY
20 HERE. THE FEMALE WITNESS HAS WALKED BACK AND FORTH AS TO
21 WHAT HAPPENED, AND THEN IT COMES OUT THAT SHE DIDN'T ACTUALLY
22 SEE WHAT HAPPENED. SHE'S GETTING HER INFORMATION FROM
23 ANOTHER SOURCE WHO IS NOT -- WE'RE NOT TOO SURE OF WHAT THAT
24 PERSON SAW EITHER. BUT AT THE VERY MINIMUM, THE FEMALE
25 WITNESS DOES NOT QUALIFY, IN MY VIEW, UNDER THE SPONTANEOUS
26 DECLARATION SIMPLY BECAUSE SHE DIDN'T SEE IT, AND SHE ADMITS
27 IT.

28 THE COURT: OKAY. MS. ROACH.

1 MS. ROACH: YOUR HONOR, IT'S CLEAR THAT LAURA LIMON
2 WAS PRESENT IN THE PARKING LOT WHEN THESE INDIVIDUALS WERE
3 BREAKING INTO CARS INITIALLY. SHE HAD RAN UPSTAIRS TO CALL
4 POLICE. I THINK THAT THAT IS A RATIONAL CONCLUSION, AND THE
5 ONLY RATIONAL CONCLUSION THAT CAN BE DRAWN FROM THE FACT THAT
6 SHE MADE THE 911 CALL. THEN SHE IS PRESENT WHILE SHE LISTENS
7 TO WHAT IS GOING ON AND WHILE WE LISTEN TO WHAT IS GOING ON
8 ON THE TAPE, INCLUDING HEARING A GUNSHOT. SPONTANEOUS
9 DECLARATIONS ARE NOT RESERVED FOR THINGS THAT PEOPLE SEE.
10 ANYTHING THAT SOMEBODY EXPERIENCES AND CAN TESTIFY TO IN
11 COURT, THEY CAN TESTIFY TO IN THE FORM OF A SPONTANEOUS
12 STATEMENT.

13 IN ADDITION, THERE'S A CATCHALL PROVISION UNDER THE
14 HEARSAY RULE FOR TRUSTWORTHY HEARSAY. AND HERE WHERE
15 MS. LIMON IS RELAYING SOME INFORMATION CLEARLY THAT HER
16 BROTHER-IN-LAW IS GIVEN HER, WE HEAR THE BROTHER-IN-LAW
17 GIVING IT TO HER. WE HEAR THE INCIDENT GOING DOWN BLOW BY
18 BLOW. AND I THINK THIS IS EXACTLY THE TYPE OF EVIDENCE THAT
19 THAT CATCH ALL PROVISION WOULD ENCOMPASS.

20 IN ADDITION TO THAT, THERE REALLY IS A DOUBLE EXCEPTION
21 HERE, BECAUSE YOU'VE GOT MR. HERRERA WHO IS SEEING THIS
22 INCIDENT, WHO IS EXCITED BY THE INCIDENT, AND YOU'VE GOT
23 MS. LIMON WHO IS SEEING THIS INCIDENT, AND EXCITED BY THE
24 INCIDENT, AND THE COMMUNICATION BETWEEN HERRERA AND LIMON
25 REALLY QUALIFIES AS A DOUBLE EXCEPTION UNDER THE HEARSAY
26 RULE.

27 I THINK THIS IS AN ABSOLUTELY CLASSIC 911 TAPE OF AN
28 INCIDENT GOING DOWN IN PROGRESS. THERE'S NOTHING TO INDICATE

1 THAT THERE'S ANYTHING FRAUDULENT. IT'S CERTAINLY CHAOTIC.
2 CERTAINLY THERE'S SOME AREAS THAT ARE GOING TO NEED
3 CLARIFICATION. I THINK THE 911 OPERATOR SEES THAT HERSELF.
4 BUT THAT'S INHERENT TO ANY TYPE OF SITUATION WHERE YOU'VE GOT
5 A VIOLENT ACT THAT OCCURS.

6 ^ MR. SANCHEZ: YOUR HONOR, JUST BRIEFLY IN RESPONSE.
7 THERE'S NO DISPUTE THAT THIS FEMALE WITNESS HEARD A GUNSHOT.
8 THAT'S NOT IN DISPUTE. CERTAINLY SHE COULD HAVE HEARD IT
9 DOWNSTAIRS OR UPSTAIRS OR WHEREEVER, AND THAT'S NOT THE
10 DISPUTE. NOBODY IS ARGUING TO THAT.

11 THE ISSUE HERE, THOUGH, IS, WAS THE GUNSHOT FIRED AT THE
12 INDIVIDUALS, OR WAS IT FIRED UP IN THE AIR. THAT -- THAT --
13 THAT SHE DIDN'T SEE. THAT SHE CAN'T TELL BY HEARING, AND
14 THAT SHE CAN -- THE ONLY WAY SHE COULD TELL IS BY LISTENING
15 TO SOMEBODY ELSE. AND EVEN THEN, ADMITTEDLY, SHE GOT IT
16 WRONG BECAUSE WE GOT A TOTALLY DIFFERENT STORY FROM A PERSON
17 WHO DID SEE IT.

18 SO IT'S NOT AN ISSUE AS TO WHETHER THE GUNSHOT -- IF SHE
19 HEARD THAT OR NOT. NOBODY'S DISPUTING THAT. CERTAINLY SHE
20 DID. IF THAT WAS THE ONLY THING WE WERE GOING TO HEAR FROM
21 HER, THERE WOULD BE NO OBJECTION. "I HEARD A GUNSHOT." BUT
22 SHE'S ATTEMPTING TO INFORM -- AT THE TIME SHE -- YES, SHE IS
23 SHOOKED UP, AND SHE'S BEING SORT OF GRILLED BY THE POLICE
24 DISPATCHER AT THE SAME TIME. BUT THIS KIND OF TAPE COMING
25 OUT TO A JURY GIVES THE IMPRESSION -- A FALSE ONE -- THAT THE
26 GUNSHOT WAS BEING FIRED AT THESE INDIVIDUALS.

27 THE COURT: MR. LEAHY.

28 MR. LEAHY: YOUR HONOR, I WOULD JUST SUGGEST TO

1 THE COURT THAT I ASSUME THAT BOTH OF THESE PEOPLE ARE GOING
2 TO TESTIFY IN THE TRIAL, AND SO I WONDER WHY THIS IS EVEN
3 RELEVANT. BUT I THINK AS LONG AS THEY'RE GOING TO BE
4 WITNESSES WE SHOULD TAKE THEM ON VOIR DIRE OUTSIDE OF THE
5 PRESENCE OF THE JURY AND GET INTO THESE FACTS.

6 I'M NOT SO SURE THAT A SPONTANEOUS DECLARATION IS -- IF
7 YOU LOOK AT THE DEFINITION OF A SPONTANEOUS DECLARATION IT
8 DOESN'T SAY ANYTHING ABOUT RELATING WHAT SOMEBODY ELSE TELLS
9 THEM, AND THE OTHER PERSON -- IF THE OTHER PERSON HAS THE
10 RIGHT TO CLAIM SPONTANEOUS DECLARATION THAT SOMEHOW THE
11 SECOND PERSON, THE REPORTING INDIVIDUAL, SOMEHOW GETS TO
12 CLAIM IT.

13 AND I DON'T KNOW WHERE -- HOW THIS GENERAL RULE THAT,
14 "WELL, THERE'S A SUCH THING AS TRUSTWORTHY HEARSAY AND THIS
15 FALLS WITHIN THAT," I DON'T THINK THAT THAT APPLIES HERE. SO
16 I THINK THAT WE NEED SOME FURTHER FOUNDATION BEFORE WE DECIDE
17 WHAT TO DO WITH THIS TAPE.

18 THE COURT: OKAY. ANYTHING FURTHER?

19 MS. ROACH: JUST FINALLY, YOUR HONOR. I THINK THE
20 TAPE IS VERY CLEAR THAT THE SHOT WAS NOT FIRED DIRECTLY AT
21 THE WITNESS. HOWEVER, EVEN THE WITNESS HIMSELF WHEN HE IS
22 ASKED SAYS, "YES, THEY'RE FIRING IT AT ME," BECAUSE WHAT HE
23 ASSUMES IS THAT IT'S IN RESPONSE TO HIS WORDS, "WE'RE CALLING
24 THE COPS." SO THERE IS REALLY NOT A DISPUTE OF FACTS WITHIN
25 THE TAPE. IT'S SIMPLY A FLUSHING OUT OF WHAT HAPPENED. I
26 THINK THE TAPE, IF I WERE TO COME IN AND ONLY PLAY
27 MS. LIMON'S PART OF THE CONVERSATION WOULD PROBABLY BE
28 INADMISSIBLE. BUT THE FACT IS WE'RE PLAYING THE ENTIRE

1 CONVERSATION. THE CONTENTS OF THAT CONVERSATION IS
2 IMPORTANT. THERE ARE CLEARLY SPONTANEOUS STATEMENTS MADE BY
3 MR. HERRERA. AND MS. LIMON'S STATEMENTS PROVIDE THE CONTEXT
4 FOR HIS STATEMENTS COMING IN. AND I WOULD URGE THE COURT TO
5 ADMIT IT.

6 THE COURT: OKAY. ANYTHING FURTHER?

7 MR. LEAHY: NO, YOUR HONOR.

8 MR. SANCHEZ: NOTHING FURTHER.

9 THE COURT: OKAY. THE COURT AGREES WITH THE FIRST
10 PART OF MR. LEAHY'S STATEMENT THAT THE SECOND CALL DOES NOT
11 APPEAR TO BE A SPONTANEOUS STATEMENT MADE UNDER THE STRESS OF
12 AN EXCITING EVENT. IT'S A WOMAN WHO CALLS IN BASICALLY
13 SAYING THAT SHE HAS GOTTEN WORD, SOMEONE KNOCKED ON HER DOOR
14 AND TOLD HER SOMEONE WAS BREAKING INTO CARS. SO SHE RELAYED
15 THAT TO THE POLICE. SO THAT DOES NOT APPEAR TO BE A
16 SPONTANEOUS STATEMENT UNDER THE STRESS OF THE EXCITEMENT OF
17 THE EVENT. SO THE SECOND CALL WILL BE EXCLUDED.

18 WITH REGARD TO THE FIRST CALL, THE PRIMARY PERSON WHO IS
19 EXPERIENCING THE EXCITED EVENTS IS MR. HERRERA, AND HE IS
20 RELAYING THAT THROUGH THE FEMALE. AND IT'S VERY CLEAR FROM
21 THE CONTENT OF THE TAPE THAT HE SAYS SOMETHING, THEN SHE
22 REPEATS IT TO THE OPERATOR. AND THAT'S THROUGHOUT THE ENTIRE
23 TAPE. THE OPERATOR ASKS, "HOW MANY SUBJECTS?" SHE THEN
24 CALLS OUT, "HOW MANY ARE THERE? HOW MANY GUYS ARE THERE?"
25 AND THEN HE RESPONDS BACK, "TWO." AND THEN THE FEMALE
26 REPLIES BACK, "TWO. THERE ARE TWO OF THEM." SO IT'S CLEARLY
27 THAT QUESTION, RESPONSE, AND IT'S GOING THROUGH HER. THE
28 FEMALE IS SIMPLY A CONDUIT FOR THE EXCITED STATEMENTS OF

1 MR. HERRERA WHO IS THE ONE OUT THERE PERCEIVING IT. AND SO
2 IT'S HIS SPONTANEOUS STATEMENTS, AND THE FEMALE IS THE
3 CONDUIT FOR HIS EXCITED STATEMENTS.

4 AND IN ADDITION TO THAT, OR TO SUPPLEMENT THAT, IT IS
5 CLEAR FROM THE CONTENT THAT SHE WAS ONE OF THE INDIVIDUALS
6 WHO INITIALLY SAW THEM DOING THE BREAKING INTO THE CARS, THEN
7 RAN OFF TO CALL THE POLICE. SO IN THAT SENSE, SHE IS ALSO
8 UNDER THE EXCITEMENT OF THE EVENTS AT THE TIME IN TERMS OF
9 HER REPORTING THAT, HERE'S SOMETHING THAT SHE PERCEIVED,
10 I.E., THE BREAKING INTO OF THE VEHICLES.

11 SO HER PART WITH REGARD TO WHAT SHE PERCEIVED ARE HER
12 SPONTANEOUS STATEMENTS, AND THE OTHER STATEMENTS THAT ARE
13 RELAYED THROUGH HER FROM MR. HERRERA ARE MR. HERRERA'S
14 SPONTANEOUS STATEMENTS. AND ANYTHING BEYOND THAT CERTAINLY
15 ONCE THE WITNESSES ARE ON THE STAND, THEY CAN BE
16 CROSS-EXAMINED TO WHAT EXACTLY THEY SAW. BUT THERE WAS A
17 BACK AND FORTH AS TO WHETHER THE SHOTS WERE SHOT AT THE
18 INDIVIDUALS OR UP IN THE AIR, AND I THINK THAT WOULD JUST
19 UNDER THE EXCITEMENT OF THE TIME THAT THEY SAID, "YES, THEY
20 WERE SHOT AT ME." BUT THEN WHEN THEY TRIED TO PIN THEM DOWN,
21 THEY SAY, "NO, THESE WERE SHOT IN THE AIR." AND SO THAT, IF
22 ANYTHING, JUST LENDS FURTHER CREDIBILITY TO THE FACT THAT
23 THEY ARE UNDER THE EXCITEMENT OF THE EVENT, AND EXPLAINING IT
24 MORE CLEARLY THE MORE INQUIRIES THERE ARE MADE BY THE
25 OPERATOR.

26 SO THE COURT WILL RULE THAT THE SECOND CALL WILL BE
27 EXCLUDED, AND FIRST CALL WILL BE ADMITTED.

28 AND IF YOU'LL CLEAN UP THE TRANSCRIPTS TO DELETE THAT

1 SECOND ONE. AND ALSO, YOU'VE MADE SOME HAND NOTATIONS. IF
2 YOU'LL HAVE THOSE TYPED IN, OKAY? ALL RIGHT. AND ARE THERE
3 ANY OTHER IN LIMINE'S BEFORE WE ADJOURN FOR TODAY?

4 MR. LEAHY: NO, YOUR HONOR.

5 MR. SANCHEZ: NO, YOUR HONOR.

6 MS. ROACH: NO.

7 THE BAILIFF: YOUR HONOR, I JUST GOT A CALL. THERE
8 IS NO DRESS-OUT ORDER FOR MR. RODRIGUEZ AT THIS TIME.

9 THE COURT: OKAY. SO MR. SANCHEZ WOULD YOU PREPARE
10 ANOTHER ONE?

11 MR. SANCHEZ: YES, I WILL.

12 THE COURT: AND SO I CAN SIGN THAT AND MAKE SURE
13 THAT HE'S DRESSED OUT FOR TOMORROW. TOMORROW WE WILL BEGIN
14 AT 9 A.M. SHARP, AND WE'LL SEE YOU TOMORROW MORNING.

15 MR. LEAHY: YOUR HONOR, I WAS GOING TO ASK THE
16 COURT TO INDULGE ME A LITTLE IN THE MORNING, IF POSSIBLE. I
17 KNOW THIS IS --

18 THE COURT: WE'RE ALREADY GOING TO BE DARK THREE
19 DAYS.

20 MR. LEAHY: I KNOW. I KNOW. I HAVE A SENTENCING
21 DOWNTOWN AT 9. OBVIOUSLY, I'M JUST GOING TO CONTINUE IT.
22 BUT I WOULD LIKE TO HAVE AN OPPORTUNITY -- I WILL TRY AND GET
23 THERE QUITE A WAYS BEFORE 9 O'CLOCK AND SEE IF I CAN GET IN
24 AND JUST CONTINUE IT. BUT --

25 THE COURT: BUT CAN'T YOU GET SOMEONE ELSE TO MAKE
26 THAT APPEARANCE?

27 MR. LEAHY: I CAN TRY, BUT ALL OF THE PEOPLE IN MY
28 OFFICE ARE ON VACATION, EVERYBODY EXCEPT ME. SO --

1

36-100

2

3

THE COURT: WELL, WHATEVER PUBLIC DEFENDER IS
ASSIGNED TO THAT DEPARTMENT --

4

5

6

MR. LEAHY: WE'LL, IT'S A SENTENCING IN A SPECIAL
DEPARTMENT, SO, I MEAN, IT'S NOT A REGULAR PUBLIC DEFENDER
APPEARANCE.

7

8

THE COURT: OKAY. BECAUSE I WANT TO START AT 9, IF
AT ALL POSSIBLE.

9

10

11

12

13

MR. LEAHY: YES, YOUR HONOR.

THE COURT: OKAY. THANK YOU.

(AT 4:26 P.M. AN ADJOURNMENT WAS TAKEN UNTIL
TUESDAY, AUGUST 5, AT 9:00 A.M.)

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(THIS PAGE DESIGNATED 36-100 FOR BLOCK-NUMBERING
PURPOSES ONLY. PROCEEDINGS CONTINUE ON PAGE 101.
NOTHING OMITTED.)

1

CERTIFICATE OF REPORTER

2

3

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN DIEGO)

4

5

6

THE PEOPLE OF THE STATE OF CALIFORNIA

7

VS.

8

JAVIER RODRIGUEZ

9

CASE NO. SCS176087

10

AUGUST 4, 2003

11

PAGES 1 -- 36-100

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19

I, IRENE PERKINS, CSR NO. 12727, A CERTIFIED SHORTHAND
REPORTER IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN
AND FOR THE COUNTY OF SAN DIEGO, HEREBY CERTIFY THAT I MADE A
SHORTHAND RECORD OF THE PROCEEDINGS HAD IN THE WITHIN CASE
AND THAT THE FOREGOING TRANSCRIPT IS A FULL, TRUE, AND
CORRECT TRANSCRIPTION OF THE PROCEEDINGS IN THIS CASE.

20

DATED THIS 22ND DAY OF DECEMBER, 2003.

21

22

23

24

25

26

27

28


IRENE PERKINS, CSR 12727

COURT OF APPEAL -- STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA,	)	FROM SAN DIEGO COUNTY
PLAINTIFF AND RESPONDENT,	)	HON. ESTEBAN HERNANDEZ,
	)	JUDGE
VS.)	
)	
JAVIER RODRIGUEZ,	)	APPEAL NO. D043198
DEFENDANT AND APPELLANT.	)	NO. SCS176087

REPORTER'S TRANSCRIPT ON APPEAL

AUGUST 7, 2003

SAN DIEGO, CALIFORNIA

VOL. II

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COPY

APPEARANCES:

FOR THE PLAINTIFF AND RESPONDENT: BILL LOCKYER
ATTORNEY GENERAL
STATE OF CALIFORNIA
110 WEST A STREET
SAN DIEGO, CA. 92101

FOR THE DEFENDANT AND APPELLANT: JAVIER RODRIGUEZ
IN PRO PER

REPORTED BY: IRENE PERKINS, CSR 12727

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO, SOUTH COUNTY DIVISION
DEPARTMENT 14 BEFORE HON. ESTEBAN HERNANDEZ, JUDGE

PEOPLE OF THE STATE OF CALIFORNIA,)	
)	
PLAINTIFF,)	
)	
VS.	)	CASE NO. SCS176087
)	
JOSE LUIS LEON)	
&)	
JAVIER RODRIGUEZ,)	
)	
DEFENDANTS.)	
)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

AUGUST 7, 2003

APPEARANCES:

FOR THE PLAINTIFF:	SOPHIA ROACH DEPUTY DISTRICT ATTORNEY
FOR DEFENDANT LEON:	JERRY LEAHY ATTORNEY AT LAW
FOR DEFENDANT RODRIGUEZ:	BENJAMIN, SANCHEZ ATTORNEY AT LAW

1 A. EXACTLY. CLOSE THE DOOR.

2 Q. WAS LAURA ALREADY ON THE PHONE TO 911 WHEN THAT
3 HAPPENED?

4 A. OH, YEAH.

5 Q. NOW, NOW AFTER THE 911 CALL WAS PLACED, DID THE
6 POLICE ARRIVE TO TAKE A STATEMENT FROM YOU?

7 A. YEAH.

8 Q. AND DID THEY TAKE YOU TO A LOCATION AWAY FROM THE
9 APARTMENTS?

10 A. YES.

11 Q. DID THEY ASK YOU TO LOOK AT SOME SUSPECTS THAT THEY
12 HAD IN CUSTODY?

13 A. YES.

14 Q. DID THEY GIVE YOU AN ADMONITION ABOUT THESE COULD
15 BE THE RIGHT PEOPLE, THESE MIGHT NOT BE THE RIGHT PEOPLE, AND
16 IT WAS UP TO YOU?

17 * A. NO, THEY TOLD US THAT THEY FOUND THE GUN ON HIM AND
18 THEY FOUND THE CAR -- THE VEHICLE, AND THEN THEY FOUND SOME
19 ITEMS OF THE PERSON THAT THEY BROKE IN.

20 Q. DO YOU KNOW IF THEY TOLD YOU THAT BEFORE YOU MADE
21 AN IDENTIFICATION OR AFTER?

22 A. NO, AFTER.

23 Q. OKAY. AND BEFORE YOU MADE THE IDENTIFICATION, DID
24 THEY SAY ANYTHING TO YOU ABOUT ACTUALLY MAKING THE
25 IDENTIFICATION? DID THEY READ YOU SOMETHING BEFORE YOU
26 LOOKED AT ANYBODY INVOLVED IN THIS CRIME?

27 * A. NO.

28 Q. SO YOU DON'T REMEMBER ANYTHING LIKE THAT?

1 A. NO.

2 Q. ALL RIGHT. NOW, DID THEY SHOW YOU THE INDIVIDUALS
3 ONE AT A TIME OR TOGETHER?

4 A. ONE AT A TIME.

5 Q. AND HOW MANY PEOPLE DID THEY SHOW YOU ALTOGETHER?

6 A. TWO.

7 Q. DID YOU RECOGNIZE THE TWO PEOPLE THAT THEY SHOWED
8 YOU?

9 A. YES, I DID.

10 Q. DO YOU SEE THOSE TWO PEOPLE HERE IN COURT TODAY?

11 A. YES, I DO.

12 Q. THE INDIVIDUAL THAT YOU'VE DESCRIBED AS THE TALL
13 ONE, CAN YOU PLEASE TELL US WHERE HE IS SEATED AND WHAT HE IS
14 WEARING?

15 A. WELL, THEY DON'T LOOK ALIKE, YOU KNOW. THEY'VE
16 CHANGED A LITTLE BIT.

17 Q. OKAY. DO YOU SEE THE PERSON THAT YOU IDENTIFIED ON
18 THAT DAY HERE IN COURT?

19 A. THEY DON'T LOOK THE SAME ANYMORE.

20 Q. OKAY. WHEN YOU SAY, "THEY DON'T LOOK THE SAME," DO
21 YOU RECOGNIZE THEM?

22 ~~A.~~ A. NO, I DON'T KNOW THEM, SO, NO.

23 Q. SO DO YOU SEE THE SHORT ONE HERE IN COURT TODAY?

24 ~~A.~~ A. NO.

25 Q. NOW, BACK ON THE DATE THAT THIS HAPPENED WHEN YOU
26 WERE SHOWN TWO PEOPLE THAT HAD BEEN TAKEN INTO CUSTODY, DID
27 YOU RECOGNIZE THE PERSON WHO YOU DESCRIBED AS THE TALL ONE?

28 ~~A.~~ A. THEY SHOWED US REAL FAST, SO, YOU KNOW.

1 Q. DID YOU TELL THE POLICE THAT YOU RECOGNIZED THE
2 TALL ONE?

3 A. YEAH.

4 Q. AND, IN FACT, DID YOU TELL THEM YOU WERE 100
5 PERCENT POSITIVE?

6 A. YES, I DID.

7 Q. AND DID YOU TELL THE POLICE THAT YOU RECOGNIZED THE
8 SHORT ONE WITH THE BLACK JACKET?

9 A. YES, I DID.

10 Q. AND YOU ALSO TOLD THE POLICE MORE DETAILS ABOUT
11 WHAT THE INDIVIDUALS WERE WEARING AT THE TIME YOU SAW THEM
12 BREAK INTO THE CAR; IS THAT CORRECT?

13 ~~A.~~ A. WELL, YEAH, I THINK SO, BUT I DON'T REMEMBER RIGHT
14 NOW EXACTLY WHAT THEY HAD. IT WAS A LONG TIME AGO, SO I
15 CAN'T TELL YOU EXACTLY WHAT THEY HAD ON. I WAS SO EXCITED.
16 I WAS ABOUT THE SAFETY OF MY KID, SO, YOU KNOW.

17 Q. WOULD IT HELP REFRESH YOUR RECOLLECTION TO READ
18 THROUGH THAT VERSION OF YOUR POLICE REPORT?

19 A. WELL, I GUESS SO.

20 MR. LEAHY: YOUR HONOR, I DON'T THINK A PROPER
21 FOUNDATION HAS BEEN MADE TO REFRESH HIS RECOLLECTION.

22 THE COURT: OVERRULED.

23 THE WITNESS: IT WAS 3 O'CLOCK IN THE MORNING, YOU
24 KNOW.

25 BY MS. ROACH:

26 Q. AND SHOWING YOU THE THIRD PARAGRAPH HERE, PAGE 6.
27 IF YOU COULD READ THAT QUIETLY TO YOURSELF. LET ME KNOW WHEN
28 YOU'RE DONE.

1 MR. LEAHY: COULD WE ASK WHAT SHE'S USING TO

2 REFRESH HIS RECOLLECTION, YOUR HONOR?

3 MS. ROACH: THIRD PARAGRAPH, PAGE 6. OFFICER

4 PICONE'S REPORT.

5 BY MS. ROACH:

6 Q. AND IS YOUR RECOLLECTION REFRESHED AS TO WHETHER
7 YOU PROVIDED A MORE SPECIFIC DESCRIPTION AS TO WHAT THE TALL
8 ONE WAS WEARING?

9 A. WELL, I SAID THAT, WHAT IT SAYS THERE.

10 Q. OKAY. DID YOU TELL POLICE THAT HE WAS WEARING A
11 WHITE SHIRT?

12 A. YES, I DID.

13 Q. AND WITH REGARD TO THE SHORT ONE, DO YOU RECALL
14 WHETHER THE SHORT ONE WAS WEARING A DARK COLOR OR A LIGHT
15 COLOR?

16 A. I THINK HE HAD A BLACK JACKET ON.

17 Q. WHILE YOUR WIFE'S ON THE PHONE TO 911, WERE YOU
18 PROVIDING HER SPECIFICALLY WITH INFORMATION ABOUT --

19 A. YEAH.

20 Q. -- WHAT YOU HAD SEEN TO TRY AND GET THE POLICE
21 THERE?

22 A. YEAH, I WAS KIND OF MAD. I WAS TELLING HER, "WHY
23 DON'T THEY HURRY UP? WHY ARE THEY TAKING SO LONG? WHY ARE
24 THEY ASKING ALL THESE QUESTIONS?" THAT'S THE ONLY THING I
25 RECALL BECAUSE AT THE TIME I WAS ALL EXCITED BECAUSE I DIDN'T
26 KNOW IF THEY WERE GOING TO COME TO US TO OUR APARTMENT. SO
27 THAT'S WHY I WAS TELLING THEM, "TELL THEM TO HURRY UP. WHY
28 IS NOBODY HERE?"

1 Q. SO YOU DO REMEMBER SPEAKING WITH YOUR WIFE WHILE

2 SHE WAS ON THE PHONE?

3 ~~A.~~ A. YEAH, WELL, EVERYBODY WAS SPEAKING TO HER. THERE
4 WAS BIG DRAMA GOING ON.

5 Q. AND MR. HERRERA, DO YOU HAVE CONCERNS ABOUT
6 IDENTIFYING ANYBODY HERE IN COURT TODAY?

7 A. CAN YOU REPEAT THAT?

8 Q. DO YOU HAVE CONCERNS ABOUT IDENTIFYING ANYBODY HERE
9 IN COURT TODAY?

10 A. DO I WANT TO IDENTIFY THEM?

11 Q. YEAH. DO YOU WANT TO IDENTIFY SOMEBODY HERE IN
12 COURT TODAY?

13 A. NO.

14 Q. AND YOU DID NOT WANT TO BE HERE IN COURT TODAY,
15 CORRECT?

16 A. NO, I DIDN'T WANT TO BE HERE.

17 Q. AND AS A MATTER OF FACT, YOU WERE ORDERED BACK THIS
18 MORNING AND YOU DIDN'T APPEAR, AND YOU HAD TO BE BROUGHT IN;
19 IS THAT CORRECT?

20 A. EXACTLY.

21 Q. AND INITIALLY WHEN I ASKED YOU IF YOU RECOGNIZED
22 THE PEOPLE THAT BROKE INTO THE CAR AND ASKED YOU IF THEY WERE
23 HERE IN COURT TODAY, YOU SAID, "YES"; IS THAT RECOGNIZE?

24 A. YES.

25 Q. THEN WHEN I ASKED YOU TO IDENTIFY THOSE PEOPLE
26 INDIVIDUALLY AND ASKED WHERE THEY WERE SEATED, YOU WOULD NOT
27 DO THAT; IS THAT CORRECT?

28 A. NO, BECAUSE I DON'T WANT ANY PROBLEMS. I'M KIND OF

1 SCARED. I DON'T WANT NOBODY GOING TO MY HOUSE AND DOING
2 STUFF.

3 Q. ARE THEY HERE IN COURT TODAY?

4 A. YES, THEY ARE.

5 Q. CAN YOU PLEASE TELL US WHERE THE TALL ONE IS
6 SEATED.

7 A. OVER THERE.

8 MS. ROACH: MAY THE RECORD PLEASE REFLECT THAT THE
9 WITNESS HAS POINTED IN DEFENDANT LEON'S DIRECTION.

10 THE COURT: INDICATE AN ITEM OF CLOTHING.

11 BY MS. ROACH:

12 Q. CAN YOU TELL ME WHAT HE'S WEARING?

13 A. YEAH, HE HAS A -- THE DARK GRAY SHIRT.

14 BY MS. ROACH:

15 Q. AND --

16 THE COURT: SHORT-SLEEVED?

17 THE WITNESS: LONG-SLEEVED.

18 THE COURT: LONG-SLEEVED. RECORD WILL REFLECT
19 IDENTIFICATION OF DEFENDANT LEON.

20 BY MS. ROACH:

21 Q. AND IS THE SHORT ONE HERE IN COURT TODAY?

22 A. YES, HE IS.

23 Q. CAN YOU PLEASE TELL ME WHERE HE'S SEATED?

24 A. RIGHT THERE IN FRONT.

25 Q. CAN YOU TELL ME AN ITEM OF CLOTHING THAT HE'S
26 WEARING?

27 A. SQUARE SHIRT.

28 Q. BY SQUARE DO YOU MEAN PLAID?

1 A. UH-HUH.

2 THE COURT: RECORD WILL REFLECT IDENTIFICATION OF
3 DEFENDANT RODRIGUEZ.

4 MS. ROACH: THANK YOU, YOUR HONOR. THANK YOU,
5 MR. HERRERA. I HAVE NOTHING FURTHER.

6 THE COURT: THANK YOU. CROSS-EXAM, MR. LEAHY.

7 MR. LEAHY: THANK YOU, YOUR HONOR.

8 CROSS-EXAMINATION

9 BY MR. LEAHY:

10 Q. GOOD MORNING, MR. HERRERA.

11 A. GOOD MORNING.

12 Q. THIS EVENT HAPPENED BACK IN MAY OF THIS YEAR,
13 RIGHT?

14 A. YES, SIR.

15 Q. AND YOU AND LAURA AND ANGEL HAD GONE DOWN TO MEXICO
16 THAT DAY, CORRECT?

17 A. YES.

18 Q. YOU HAD BEEN IN MEXICO THE WHOLE DAY UNTIL LATE
19 INTO THE EVENING?

20 A. THE WHOLE WEEKEND.

21 Q. WHOLE WEEKEND?

22 A. YEAH.

23 Q. DO YOU REMEMBER WHAT DAY OF THE WEEK IT WAS WHEN
24 THIS INCIDENT HAPPENED?

25 A. NO, I DON'T.

26 Q. YOU WERE COMING BACK FROM ROSARITA BEACH, I THINK;
27 IS THAT RIGHT?

28 A. YES, SIR.

1 Q. DID YOU HAVE ANYTHING OF AN ALCOHOLIC NATURE TO
2 DRINK WHILE YOU WERE IN MEXICO?

3 * A. OH, YEAH. WE WERE PARTYING ON THE WEEKEND.

4 Q. OKAY. WAS LAURA PARTYING WITH YOU ALSO?

5 A. NO, SHE DON'T DRINK.

6 Q. OKAY. BUT ANGEL -- YOU AND ANGEL WERE PARTYING?

7 A. YEAH.

8 Q. YOU HAD A RENTAL CAR, CORRECT?

9 A. YES, SIR.

10 Q. AND YOU CAME BACK ACROSS THE BORDER, AND WHO WAS
11 DRIVING THE RENTAL CAR?

12 * A. MY WIFE.

13 Q. LAURA?

14 A. YEAH.

15 Q. OKAY. ARE YOU SURE SHE WASN'T SEATED IN THE
16 BACKSEAT OF THE VEHICLE?

17 A. I DON'T REMEMBER. IT WAS A LONG TIME AGO. SO I
18 DON'T REMEMBER EXACTLY IF SHE WAS DRIVING OR HE WAS DRIVING.

19 Q. OKAY. "HE," MEANING ANGEL?

20 A. WELL, YEAH, HE WAS THE ONLY ONE IN THE VEHICLE. IT
21 COULDN'T HAVE BEEN MY LITTLE KID.

22 Q. SO THE DRIVER COULD HAVE BEEN LAURA, OR IT COULD
23 HAVE BEEN --

24 * A. YEAH, ONE OF THE BOTH OF THEM BECAUSE I DON'T HAVE
25 A LICENSE, SO I WASN'T DRIVING.

26 Q. OKAY. ALL RIGHT. WHEN YOU FIRST GOT IN THE
27 PARKING LOT, YOU DIDN'T ACTUALLY PARK IN A SPOT, CORRECT?

28 A. NO, YES, WE DID.

1 Q. DID YOU HAVE TO -- LET ME ASK YOU THIS QUESTION.

2 ISN'T IT TRUE THAT THE FIRST PLAN YOU HAD WAS TO DRIVE UP
3 NEAR THE BUILDING AND LET LAURA OUT OF THE BACKSEAT?

4 A. NO, IT WAS TO UNLOAD OUR STUFF AND MY BROTHER'S
5 STUFF THAT WAS IN THE TRUCK.

6 Q. I'M SORRY?

7 A. TO UNLOAD OUR STUFF FROM THE TRUCK, BECAUSE NOW
8 THAT I RECALL, WE DIDN'T PARK EXACTLY IN A PARKING THING. IT
9 WAS NEXT TO A HANDICAP LITTLE THING. THAT'S WHERE WE WERE
10 PARKED.

11 Q. OKAY. BUT LAURA GOT OUT, AND SHE HAD THE --

12 ~~X~~ A. I DON'T REMEMBER WHO GOT OUT. I WAS THE ONE THAT
13 HAD TO GET OUT FIRST BECAUSE I WAS IN THE PASSENGER SIDE, SO
14 I KNOW THAT. I'M THE ONE THAT SAW THEM.

15 Q. OKAY. AND YOU FIRST SAW -- YOU SAW ONE PERSON OR
16 TWO AT FIRST?

17 A. I SAW ONE.

18 Q. OKAY. AND THE FIRST PERSON YOU SAW, WHERE WAS THAT
19 PERSON STANDING?

20 A. HE WAS STANDING IN A -- IT WAS THE SHORT ONE, HE
21 WAS STANDING BY THE -- A 4RUNNER.

22 ~~X~~ Q. DO YOU KNOW WHOSE 4RUNNER THAT IS?

23 A. YEAH, IT'S MY NEIGHBOR'S.

24 Q. OKAY. WAS THERE ANY INDICATION THAT THE PERSON,
25 THE SHORT ONE, WAS DOING ANYTHING TO THE 4RUNNER?

26 A. HE WASN'T DOING NOTHING TO IT. HE WAS JUST LIKE
27 HIDING THERE.

28 Q. DID YOU SAY ANYTHING AT THAT TIME TO THAT PERSON?

1 A. I TELL MY BROTHER, "HEY, LOOK. SOMEBODY'S THERE."

2 Q. YOU SAID THAT TO ANGEL?

3 A. YES, SIR.

4 Q. NOW, WAS IT THEN THAT YOU TOLD LAURA, "HEY, TAKE
5 THE CHILD AND GET INSIDE"?

6 A. EXACTLY.

7 Q. DID YOU THINK THERE WAS GOING TO BE SOME TROUBLE --
8 MAY BE SOME TROUBLE?

9 A. I KNEW IT.

10 Q. WERE YOU GETTING NERVOUS YOURSELF?

11 A. YES, I WAS.

12 Q. OKAY. HOW MUCH HAD YOU HAD TO DRINK THAT NIGHT, DO
13 YOU REMEMBER?

14 ~~X~~ A. NOT THAT MUCH. PROBABLY A COUPLE OF BEERS. WE
15 WENT TO EAT DINNER AND THAT WAS IT. WE DRANK A COUPLE BEERS.
16 WE WERE READY TO GO BACK TO MY HOUSE WHERE I LIVE. AND
17 BEFORE WE CAME WE HAD TO STAY THERE BECAUSE ALL THAT
18 HAPPENED.

19 Q. OKAY. BECAUSE YOU WERE NERVOUS, YOU WERE -- YOU
20 STARTED TO WALK RIGHT BEHIND LAURA AS SHE WAS HEADING UP TO
21 THE APARTMENT, RIGHT?

22 A. EXACTLY.

23 Q. AND AS YOU WERE WALKING UP TO THE APARTMENT, DID
24 YOU SAY ANYTHING TO THE PERSON YOU SAW BY THE 4RUNNER?

25 ~~X~~ A. NO.

26 Q. DID YOU SAY ANYTHING TO THE PERSON BY THE 4RUNNER
27 BEFORE YOU ACTUALLY GOT TO YOUR APARTMENT?

28 A. YEAH, I -- WHEN THEY BROKE THE WINDOW OF THE JETTA,

*Sanchez
Shd. hv. mvd.
4. severance!*

1 I YELLED AT THEM, "I'M GOING TO CALL THE COPS."

2 Q. OKAY. NOW, AT SOME POINT, YOU SAW A SECOND PERSON,
3 RIGHT?

4 A. AFTERWARDS.

5 Q. WHAT DO YOU MEAN BY "AFTERWARDS"?

6 A. WELL, I DIDN'T SEE THEM AT THE MOMENT. I SAW THEM
7 WHEN MY BROTHER WALKED UP TO THEM AND TOLD HIM, "HEY," THE
8 ONE HE SAW HE WALKED UP BECAUSE HE WAS MESSING WITH HIS
9 TRUCK. HE SAID, "WHAT ARE YOU DOING WITH MY TRUCK? I'M JUST
10 TELLING YOU BECAUSE THAT'S MY TRUCK."

11 Q. MR. HERRERA, YOU'VE TOLD US THAT WHEN YOU SAW THE
12 SHORTER GUY BY THE CAR, YOU IMMEDIATELY TOLD LAURA, "TAKE THE
13 CHILD AND GET IN THE APARTMENT." AND YOU WERE KIND OF
14 NERVOUS AND YOU START FOLLOWING HER, CORRECT? "bi."

15 A. YEAH, BUT BEFORE THAT, MY BROTHER WALKED TO HIS
16 TRUCK AND HE SAW THE OTHER SUBJECT, THE TALL ONE.

17 Q. NOW, DID YOU SEE YOUR BROTHER WALK TO HIS TRUCK?

18 A. EXACTLY. I WAS RIGHT THERE.

19 * Q. OKAY. BUT YOU DIDN'T SEE THE OTHER SUBJECT, DID
20 YOU?

21 A. NOT YET.

22 Q. OKAY. DID YOUR BROTHER SAY ANYTHING TO ANY OF THE
23 SUBJECTS AT THAT POINT?

24 A. WELL, YEAH. HE WENT IN FRONT OF HIS TRUCK. HE SAW
25 THEM, AND THEY WERE HIDING. I DIDN'T KNOW WHAT HE WAS DOING.
26 AND THAT'S WHEN HE TOLD HIM, "WHAT ARE YOU DOING WITH MY
27 TRUCK? THAT'S MY TRUCK."

28 Q. OKAY. THAT'S WHAT ANGEL SAID?

1 A. YEAH.

2 Q. AND WHEN YOU HEARD THAT, WERE YOU ALREADY WALKING
3 BACK TO THE APARTMENT?

4 A. I WAS BARELY GETTING OFF THE CAR. WE WERE BARELY
5 GOING TO GET OUT THE KID, BECAUSE WHEN IT WAS ONE SUBJECT,
6 THE FIRST ONE THAT I SAW, I TURNED AROUND AND LOOKED AT HIM,
7 I TOLD HIM, "HEY, SOMEBODY'S THERE." BY THEN MY BROTHER
8 WALKED TO HIS TRUCK TO CHECK OUT HIS TRUCK AND HE SAW THE
9 OTHER ONE. SO WHEN HE SEES THE OTHER ONE, I TELL HIM -- I
10 OPEN THE DOOR AND SAY, "YEAH, TAKE THE KID INSIDE."

11 Q. OKAY. AND THEN YOU START WALKING BEHIND LAURA?

12 A. EXACTLY.

13 Q. NOW, DO YOU REMEMBER TELLING THE POLICE THAT YOU
14 BELIEVE YOU SAW THE GUN, DO YOU REMEMBER THAT?

15 ~~A~~ A. I NEVER SAW THE GUN. I SAW THE FIRE, NOT THE GUN.

16 Q. DO YOU REMEMBER TELLING THE POLICE THAT YOU NEVER
17 SAW THE SUBJECT FIRING THE GUN?

18 ~~A~~ A. I DON'T REMEMBER EXACTLY BECAUSE IT WAS LIKE IT
19 HAPPENED REAL QUICK. I PROBABLY DID, OR PROBABLY I DIDN'T.
20 I DON'T REMEMBER.

21 Q. SO YOU DON'T REALLY REMEMBER IF YOU SAW --

22 A. ALL I REMEMBER IS THAT I TOLD THE POLICE THAT I SAW
23 ~~A~~ THE GUN. THAT'S WHAT I DON'T REMEMBER.

24 Q. I'M SORRY?

25 A. I DON'T REMEMBER IF I TOLD THE POLICE I SAW THE GUN
26 OR I DIDN'T.

27 Q. YOU DON'T REMEMBER TELLING THE POLICE THAT YOU DID
28 NOT SEE THE GUN?

1 A. I DON'T REMEMBER.

2 Q. BUT AS YOU SIT HERE TODAY, YOU KNOW YOU DIDN'T SEE
3 THE GUN?

4 A. I DON'T REMEMBER.

5 Q. OKAY. WHAT ABOUT TELLING THE POLICE THAT YOU NEVER
6 SAW THE GUY FIRING THE GUN, REMEMBER TELLING THE POLICE THAT?

7 ~~A.~~ A. YEAH, I THINK I TOLD THEM THAT I DIDN'T SEE THEM.

8 Q. OKAY. YOUR MEMORY HAS FADED, HAS IT NOT, SINCE
9 EVENTS BACK IN MAY?

10 A. OH, YEAH, A LOT.

11 Q. SO YOU THINK YOUR MEMORY WAS BETTER BACK IN MAY
12 THAN THEY ARE TODAY?

13 A. PROBABLY NO. PROBABLY IT'S WORSE.

14 ~~Q.~~ Q. YOU THINK YOUR MEMORY IS WORSE TODAY?

15 A. YEAH.

16 Q. OKAY. YOU WENT INTO THE APARTMENT WITH LAURA,
17 CORRECT?

18 A. YES, SIR.

19 Q. DID YOU SEE HER DIAL 911?

20 A. I WAS NOT EVEN THERE WHEN SHE DIALED 911. HOW AM I
21 GOING TO SEE HER DIAL 911? SHE WENT FIRST, REMEMBER?

22 Q. OKAY. YOU WERE WALKING BEHIND LAURA TO THE
23 APARTMENT, CORRECT?

24 A. YES, SIR.

25 Q. SHE GOT IN THE APARTMENT AHEAD OF YOU, CORRECT?

26 A. YEAH.

27 Q. HOW LONG AFTER HER DID YOU GET INTO THE APARTMENT?

28 ~~A.~~ A. 4 SECONDS. 6 SECONDS.

1 Q. OKAY. BUT YOU DID NOT SEE HER PICK UP THE PHONE
2 AND DIAL 911?

3 A. NO, SHE WAS ALREADY ON THE PHONE WHEN I GOT IN
4 THERE.

5 Q. OKAY. SO BY THE TIME YOU GET IN THE APARTMENT
6 SHE'S ALREADY ON THE PHONE, RIGHT?

7 A. YEAH.

8 Q. NOW, FROM INSIDE THE APARTMENT YOU CAN'T SEE THE
9 JETTA, COULD YOU?

10 A. YES, YOU CAN.

11 Q. YOU CAN?

12 ~~A~~ A. FROM THE ENTRANCE OF THE DOOR, YOU CAN'T SEE THE
13 JETTA. NOT INSIDE THE APARTMENT. BUT WHEN YOU WERE IN THE
14 ENTRANCE YOU CAN SEE FROM THERE.

15 Q. ALL RIGHT. WHAT ABOUT YOUR BROTHER'S TRUCK. CAN
16 YOU SEE THE OTHER TRUCK FROM INSIDE THE APARTMENT?

17 ~~A~~ A. IT WAS THERE, YEP. YOU CAN SEE THAT, TOO.

18 Q. OKAY. AND WHEN YOU GOT INTO THE APARTMENT, LAURA'S
19 ON THE PHONE. WHERE'S ANGEL?

20 A. HE'S OUTSIDE STILL, I THINK, COMING IN. HE'S
21 WALKING IN, BUT IT'S KIND OF FAR, SO IT TOOK HIM A LITTLE
22 WHILE TO COME.

23 Q. NOW, AT SOME POINT, YOU HEARD SOMETHING YOU SAW --
24 THOUGHT WAS A GUNSHOT, CORRECT?

25 ~~A~~ A. WELL, I GUESS SO.

26 Q. YOU GUESS SO?

27 ~~A~~ A. WELL, IT WAS FIRE. I DIDN'T SEE THE GUN EXACTLY,
28 YOU KNOW.

1 Q. OKAY. BUT DO YOU REMEMBER IF YOU HEARD SOMETHING
2 THAT SOUNDED TO YOU LIKE THE GUNSHOT?

3 A. YES, SIR.

4 Q. OKAY. DO YOU KNOW WHERE YOU WERE WHEN YOU HEARD
5 THAT?

6 A. IN FRONT OF THE DOOR GOING INTO THE APARTMENT.

7 Q. SO YOU WERE ALMOST AT THE APARTMENT WHEN YOU HEARD
8 IT, RIGHT?

9 A. IN THE DOOR OF THE APARTMENT.

10 Q. OKAY.

11 A. NOT ON THE INSIDE, BUT RIGHT NEAR THE DOOR.

12 Q. NOW, WAS THAT BECAUSE YOU HAD GONE INSIDE THE
13 APARTMENT AND GONE BACK TO THE DOOR?

14 A. DROPPED OFF MY KID, YOU KNOW, BECAUSE MY WIFE GOT
15 THE PHONE, AND WHEN SHE WAS ALREADY ON THE PHONE, MY KID
16 STARTED CRYING, SO I HAD TO PICK HIM UP AND LIE HIM DOWN ON
17 THE SOFA.

18 Q. OKAY. LAURA'S ALREADY ON THE PHONE TO 911?

19 A. YEAH.

20 MR. LEAHY: OKAY. YOUR HONOR, CAN WE PLAY THE
21 TAPE?

22 THE COURT: ALL RIGHT. EXHIBIT 6.

23 MR. LEAHY: EXHIBIT 6.

24 BY MR. LEAHY:

25 Q. MR. HERRERA, I'D LIKE TO PLAY FOR YOU NOW THE 911
26 CALL THAT LAURA MADE, OKAY?

27 A. YEAH.

28 Q. AND AFTER WE'RE DOWN PLAYING IT, I'D LIKE YOU TO

1 IDENTIFY, IF YOU CAN IDENTIFY FOR US, YOUR VOICE ON THAT
2 TAPE, OKAY?

3 A. OKAY.

4 THE COURT: COUNSEL STIPULATE WHENEVER THE TAPE IS
5 PLAYED THAT THE REPORTER NEED NOT TRANSCRIBE?

6 MS. ROACH: YES, YOUR HONOR.

7 MR. SANCHEZ: YES, YOUR HONOR.

8 THE COURT: AND MR. LEAHY?

9 MR. LEAHY: YES, YOUR HONOR.

10 THE COURT: OKAY. THANK YOU. IS IT REWOUND
11 ALREADY?

12 MR. LEAHY: YOUR HONOR, MAY I SHOW THE WITNESS A
13 TRANSCRIPT SO THAT HE CAN READ ALONG?

14 THE COURT: SURE.

15 BY MR. LEAHY:

16 Q. MR. HERRERA, I'D LIKE TO GIVE YOU -- THIS IS A
17 TRANSCRIPT THAT HAS BEEN MADE OF THE 911 TAPE, AND MAYBE THAT
18 WILL HELP YOU FOLLOW ALONG, IF YOU'D LIKE.

19 THE COURT: WHICH IS EXHIBIT 7.

20 MR. LEAHY: YES.

21 (PEOPLE'S EXHIBIT 6, 911 AUDIOTAPE, WAS PLAYED, NOT
22 REPORTED.)

23 BY MR. LEAHY:

24 Q. MR. HERRERA, WERE YOU ABLE TO IDENTIFY YOUR VOICE
25 AT ALL IN THERE?

26 * A. NO, I DIDN'T.

27 Q. NO?

28 A. NO.

1 Q. DID YOU HEAR A MALE VOICE IN THE BACKGROUND?

2 A. YEAH, THERE WAS A LOT OF STUFF GOING ON IN THE
3 BACKGROUND, SO PROBABLY ONE OF MY VOICE IN THERE, TOO.

4 Q. DOES IT REFRESH YOUR RECOLLECTION AT ALL AS TO WHAT
5 YOU WERE DOING OR -- WELL, LET ME --

6 A. I DON'T REMEMBER WHAT I WAS DOING.

7 Q. OKAY. LET ME REPHRASE THAT.

8 WHEN DID YOU FIRST BECOME AWARE THAT ANGEL HAD COME BACK
9 INTO THE APARTMENT?

10 ~~A.~~ A. I DON'T REMEMBER WHEN.

11 Q. WAS IT BEFORE LAURA WAS DONE WITH THE 911 CALL?

12 A. I DON'T REMEMBER.

13 Q. AT SOME POINT, YOU HEARD ANGEL -- LET ME REPHRASE
14 THAT. DID YOU AT ANYTIME YOURSELF PERSONALLY TELL THESE
15 PEOPLE THAT YOU SAW IN THE PARKING LOT THAT YOU WERE GOING TO
16 GO CALL THE POLICE?

17 ~~A.~~ A. I DON'T REMEMBER TELLING THEM THAT.

18 Q. DO YOU REMEMBER SAYING ANYTHING TO THOSE TWO
19 SUSPECTS?

20 ~~A.~~ A. NO, I DON'T.

21 Q. DO YOU REMEMBER ANGEL -- HEARING ANGEL SAY TO THE
22 SUSPECTS, "I'M GOING TO CALL THE POLICE," OR, "GO CALL THE
23 POLICE"?

24 ~~A.~~ A. YEAH, HE SAID, "GO CALL THE POLICE," BUT NOT TO THE
25 SUSPECTS.

26 Q. OKAY. WHO DID HE SAY THAT TO?

27 A. PROBABLY TO ME OR TO MY WIFE. I DON'T KNOW EXACTLY
28 TO WHO. I REMEMBER HEARING IT.

1 Q. WHEN HE SAID THAT, WHAT KIND OF VOICE WAS HE USING?
2 WAS HE WHISPERING OR WAS HE YELLING?

3 A. I DON'T KNOW. I DON'T REMEMBER THAT.

4 Q. DID YOU HAVE ANY TROUBLE HEARING HIM?

5 * A. NO, WE WERE ALL TOGETHER WHEN THAT HAPPENED. WHEN
6 WE GOT -- WHEN WE GOT MY KID AND ALL THAT, WE WERE ALL
7 TOGETHER. SO HE WOULDN'T BE YELLING. HE WAS JUST LIKE
8 TALKING NORMAL, PROBABLY WHISPERING KIND OF SLOW SO THEY
9 WON'T HEAR.

10 Q. AND THAT WAS AS LAURA WAS STILL TRYING TO GET OUT
11 OF THE CAR, RIGHT?

12 A. I THINK SHE WAS ALREADY OFF THE CAR BECAUSE WE GOT
13 OFF THE CAR FIRST, AND THEN WE GOT THE KID OUT.

14 Q. OKAY. SO YOU WERE TRYING TO GET THE KID OUT, YOU
15 WERE HELPING TO GET THE KID OUT, AND THEN THAT'S WHEN ANGEL
16 SAID, "GO CALL THE POLICE."

17 * A. YEAH, I THINK SO.

18 Q. AND, I THINK, YOU SAID IN KIND OF A LOW VOICE
19 BECAUSE YOU ALL WERE CLOSE TOGETHER, CORRECT?

20 THE COURT: IS THAT A YES?

21 THE WITNESS: YES.

22 BY MR. LEAHY:

23 Q. HE DID NOT SAY IT --

24 THE COURT: HOLD ON. BECAUSE WHEN YOU ANSWER YOU
25 NEED TO ANSWER YES OR NO BECAUSE OUR REPORTER NEEDS TO TAKE
26 IT DOWN.

27 THE WITNESS: OKAY.

28 THE COURT: YOU MAY CONTINUE.

1 MR. LEAHY: THANK YOU, YOUR HONOR. I'M SORRY.

2 BY MR. LEAHY:

3 Q. HE DID NOT SAY THAT AT THE SUSPECTS, THE PEOPLE IN
4 THE PARKING LOT, RIGHT?

5 A. NO.

6 Q. HE SAID IT TO YOU AND LAURA?

7 * A. YES.

8 Q. OKAY. HOW LONG DID IT TAKE YOU TO WALK FROM THE
9 CAR TO THE FRONT OF LAURA -- OF THE APARTMENT?

10 A. I DON'T KNOW. I DIDN'T TIME IT.

11 Q. WELL, HOW FAR IS IT?

12 A. I DON'T KNOW THE MEASUREMENTS EITHER. IT'S IN THE
13 POLICE REPORT. THEY MEASURED IT EXACTLY HOW MUCH IS IT. I
14 DON'T KNOW HOW MUCH TIME IT TOOK. ALL I KNOW IS I WAS
15 RUNNING OR WALKING REAL SLOW. I WAS EXCITED. I JUST GOT
16 THERE.

17 Q. OKAY.

18 A. I CAN'T RECALL IF IT WAS 3 SECONDS, 3 MINUTES, YOU
19 KNOW.

20 Q. IS THERE ANYWAY THAT YOU CAN ESTIMATE FOR US HOW
21 MUCH TIME PASSED?

22 A. NO, I CAN'T.

23 Q. NO?

24 A. NO.

25 Q. DID YOU -- YOU DIDN'T RUN, THOUGH, FROM THE PARKING
26 LOT TO THE --

27 A. I DON'T REMEMBER.

28 Q. OKAY. HOW OLD IS THIS CHILD?

1 A. HE'S SMALL. 5.

2 Q. WAS -- DID SOMEONE CARRY HIM TO THE APARTMENT?

3 A. WELL, YEAH. HE WAS ASLEEP.

4 Q. OKAY. WHO CARRIED HIM, DO YOU KNOW?

5 ~~A~~ A. I DON'T REMEMBER IF IT WAS ME OR HER.

6 Q. I THINK YOU TOLD US THAT WHEN YOU GOT TO THE
7 APARTMENT YOU HAD TO PUT THE CHILD DOWN, DO YOU REMEMBER
8 THAT?

9 A. BECAUSE HE WOKE UP AND HE WAS CRYING. I MOVED HIM
10 BECAUSE SHE WAS ON THE PHONE.

11 Q. AFTER?

12 A. YEAH.

13 Q. OKAY. BUT YOU'RE NOT SURE WHO CARRIED HIM TO THE
14 APARTMENT?

15 A. I THINK SHE CARRIED HIM IN.

16 Q. OKAY. SO SHE WOULDN'T HAVE BEEN RUNNING, RIGHT?

17 ~~A~~ A. WELL, NO, I DON'T THINK SO.

18 ~~Q~~ Q. OKAY. AND YOU WERE FOLLOWING HER, BEHIND HER,
19 RIGHT?

20 A. YES, SIR.

21 ~~Q~~ Q. SO IT PROBABLY TOOK A LITTLE TIME TO GET TO THE
22 APARTMENT, RIGHT?

23 A. YEAH, PROBABLY IT DID.

24 MR. LEAHY: THAT'S ALL I HAVE, YOUR HONOR. THANK
25 YOU.

26 THE COURT: THANK YOU. CROSS-EXAM, MR. SANCHEZ.

27 MR. SANCHEZ: THANK YOU, YOUR HONOR.

28 //

1 CROSS-EXAMINATION

2 BY MR. SANCHEZ:

3 Q. GOOD MORNING, MR. HERRERA.

4 A. GOOD MORNING.

5 Q. HOW ARE YOU THIS MORNING?

6 A. OKAY.

7 Q. I'M GOING TO ASK YOU A COUPLE OF QUESTIONS

8 REGARDING THE PARKING LOT, AND I WANT TO SHOW YOU WHAT'S BEEN

9 MARKED AS DEFENSE EXHIBIT A. DO YOU RECOGNIZE THIS DIAGRAM?

10 A. NO.

11 Q. OKAY. DO YOU RECOGNIZE THE LAYOUT OF THE

12 APARTMENTS ON QUINTARD?

13 A. NO, I DON'T LIVE THERE, SO, NO.

14 Q. LET ME ASK YOU THIS. ON ONE SIDE OF THIS DIAGRAM,

15 THE RIGHT-HAND SIDE AS WE'RE LOOKING AT IT, THERE IS WHAT

16 APPEARS TO BE STALLS, DO YOU SEE THOSE -- SEE THE LINES

17 THERE?

18 A. YEAH.

19 Q. STALLS FOR --

20 A. SO THIS WILL BE THE STREET?

21 Q. RIGHT. THOSE ARE STALLS FOR CARS TO BE PARKED IN,

22 OKAY? NOW, WHERE YOU PULLED IN, WAS THAT THE DRIVEWAY THAT

23 YOU PULLED IN TO?

24 A. WHICH ONE?

25 Q. WHERE THE STALLS ARE?

26 A. I CAN'T RECOGNIZE THAT. I DON'T KNOW WHERE IT WAS.

27 IT WAS JUST -- THERE WAS A SWIMMING POOL, SO IT HAS TO BE

28 THIS WAY, RIGHT? WHAT IS THIS, QUINTARD?

1 Q. NO, THOSE ARE STALLS. THAT'S WHERE THE CARS GO.

2 A. YEAH, BUT THIS IS THE STREET QUINTARD, RIGHT? THIS
3 IS THE ENTRANCE. SO MY BROTHER LIVES RIGHT THERE, AND WE
4 WERE PARKED RIGHT HERE.

5 Q. WHEN YOU SAY, "RIGHT THERE," COULD YOU IDENTIFY
6 WHAT YOU JUST SAID, "RIGHT THERE".

7 A. WELL, THESE ARE APARTMENTS, NO?

8 Q. YES.

9 A. THEN HE LIVES RIGHT THERE.

10 Q. WHERE IT SAYS 9?

11 THE COURT: IS THAT A YES?

12 BY MR. SANCHEZ:

13 Q. IS THAT A YES?

14 A. NO. DO I HAVE TO SAY WHERE HE LIVES, OR WHAT?

15 Q. WELL, YOU POINTED TO AN APARTMENT --

16 A. BUT I DON'T WANT TO TELL YOU WHERE HE LIVES
17 EXACTLY, RIGHT? DO I HAVE TO?

18 Q. YES. I ASKED YOU THE QUESTION WHAT APARTMENT DOES
19 HE LIVE IN.

20 MS. ROACH: YOUR HONOR, PERHAPS THE WITNESS CAN
21 PLACE AN "X" ON THE APARTMENT NUMBER WHERE HIS BROTHER LIVES
22 IN.

23 THE WITNESS: YEAH, I THINK SO.

24 THE COURT: OKAY. ALL RIGHT. IF YOU WILL PLACE AN
25 "X" -- DO WE HAVE A MARKER HERE -- WITH A BLUE PEN. IF YOU
26 CAN MARK THAT WITH AN "X".

27 BY MR. SANCHEZ:

28 Q. MARK WITH AN "X" WHERE YOUR BROTHER LIVES.

1 A. RIGHT THERE. RIGHT THERE.

2 Q. NOW, FROM THAT LOCATION WHERE YOU MARKED THE "X",
3 DO YOU NOW RECOGNIZE WHERE THE CARS WOULD HAVE BEEN PARKED IN
4 THE EVENING?

5 A. YEAH, WE WERE PARKED RIGHT THERE. YOU WANT ME TO
6 PUT AN "X" TOO?

7 Q. WHY DON'T YOU PUT -- PUT AN "X" WHERE YOU SEE THE
8 -- WELL PUT A "1" WHERE THE JETTA WAS PARKED.

9 A. WHERE THE JETTA WAS PARKED?

10 Q. RIGHT.

11 THE COURT: THE RECORD WILL REFLECT HE PLACED A "1"
12 ON THE EXHIBIT A.

13 BY MR. SANCHEZ:

14 Q. NOW, THERE ARE TWO --

15 A. IT'S NOT EXACTLY WHERE IT WAS, OKAY, SO YOU CAN
16 KNOW.

17 Q. THERE WERE TWO LINES OF --

18 A. YES, CORRECT.

19 Q. NOW, WERE THE CARS PARKED ON THE AISLE CLOSEST TO
20 THE APARTMENTS OR THE ONE FARTHEST?

21 A. NO, ON THE OUTSIDE.

22 Q. OKAY. SO THAT'S NOT ENOUGH ON THE SIDE THEN TO
23 SHOW WITH THIS?

24 A. YES.

25 Q. OKAY. BUT THAT'S APPROXIMATELY IN TERMS OF HOW
26 CLOSE TO THE DUMPSTER THEY WERE?

27 OKAY. HOW ABOUT THE -- HOW ABOUT THE PICKUP TRUCK?

28 A. IT WAS NEXT TO IT. WHAT DO YOU WANT ME TO PUT FOR

1 THAT?

2 Q. WELL, PUT A "2".

3 THE COURT: RECORD WILL REFLECT HE'S PLACED A "2"
4 ON THE DIAGRAM.

5 BY MR. SANCHEZ:

6 Q. OKAY. NOW, WHEN YOU PULLED IN THAT NIGHT, DO YOU
7 RECALL, WERE THE SLOTS -- THE PARKING SLOTS -- ALL FILLED
8 THAT NIGHT?

9 A. THERE WAS A COUPLE OF THEM VACANT.

10 Q. OKAY.

11 A. I DON'T KNOW, TWO PROBABLY.

12 Q. WELL, WHEN YOU PULLED IN AND PARKED THE VEHICLE
13 THAT YOU WERE IN, YOU DIDN'T PULL INTO A SLOT TO PARK, RIGHT?

14 A. NO, WE DIDN'T.

15 Q. OKAY. YOU JUST PARKED OUT ON THE --

16 A. I PARKED IT RIGHT HERE. THAT'S WHERE I WAS PARKED.
17 SEE THIS LITTLE ENTRANCE RIGHT HERE. RIGHT THERE. I WAS
18 PARKED RIGHT THERE BECAUSE WE WERE GOING TO UNLOAD.

19 Q. BUT THAT WAS NOT A --

20 A. NO, IT WASN'T.

21 Q. IT WAS NOT A PARKING PLACE?

22 A. NO.

23 Q. OKAY.

24 MS. ROACH: YOUR HONOR IS THERE ANY MARK ON EXHIBIT
25 A WHERE HE WAS. I DON'T KNOW IF HE MADE A MARK OR NOT.

26 THE COURT: PUT A "3" WHERE HE WAS PARKED.

27 BY MR. SANCHEZ:

28 Q. WELL, I DON'T KNOW. FIRST SHOW ME WHERE YOU

1 PARKED.

2 A. AGAIN, RIGHT HERE.

3 Q. OKAY. THE REASON I ASKED YOU -- THE REASON I ASK
4 YOU IS BECAUSE WHERE YOU ARE POINTING IS A PARKING PLACE.

5 A. WELL, NOW IT IS, BUT BEFORE IT WASN'T. THEY
6 REMARKED EVERYTHING, SO IT'S DIFFERENT, AND RIGHT HERE THERE
7 USED TO BE A HANDICAPPED RIGHT HERE, RIGHT?

8 Q. OKAY.

9 A. AND RIGHT NEXT TO IT THERE'S TWO POLES.

10 Q. OKAY. LET ME ASK THE QUESTIONS FIRST, OKAY?

11 A. OKAY.

12 Q. ARE YOU SAYING THEN THAT THESE SPACES WERE
13 DIFFERENT NOW THEN THEY WERE AT THE TIME?

14 A. THEY'RE DIFFERENT NOW.

15 Q. THEY'RE DIFFERENT NOW. OKAY. SO THEY'VE BEEN
16 REMARKED?

17 A. EXACTLY.

18 Q. OKAY. AND AT THE TIME THAT YOU PARKED THERE, THERE
19 WAS A HANDICAPPED SPACE THERE?

20 A. YES, SIR.

21 Q. AND YOU GUYS PARKED IN THE HANDICAPPED SPACE?

22 A. NO, NEXT TO IT.

23 Q. NEXT TO IT, THE HANDICAPPED SPACE? OKAY. WHY
24 DON'T YOU MARK -- AND THAT SPACE WAS EMPTY?

25 A. WELL, WHEN WE PARKED THERE, YES, IT WAS.

26 Q. ALL RIGHT. DO YOU WANT TO MARK A "3" WHERE YOU
27 WERE PARKED?

28 A. RIGHT THERE?

1 Q. WHERE YOU PARKED THE CAR THAT NIGHT.

2 THE WITNESS: OH, THE CAR THAT NIGHT.

3 THE COURT: THE RECORD WILL REFLECT HE'S PLACED A
4 "3" ON THE DIAGRAM.

5 THE WITNESS: BUT THAT'S NOT A STALL, OKAY?

6 FROM RIGHT THERE IT IS KIND OF DIFFERENT.

7 BY MR. SANCHEZ:

8 Q. ALL RIGHT. WERE THE SPACES NEXT TO YOU THEN, DID
9 THEY HAVE CARS IN THEM; DO YOU RECALL?

10 A. YEAH, THEY DID.

11 Q. OKAY. I'M REFERRING TO SPACES THAT GO UP FROM
12 THERE. THEY HAD ALL HAD CARS IN THEM?

13 A. ONLY ONES THAT DIDN'T HAVE WAS THE ONES BEHIND
14 THEM. IT WAS LIKE FOUR OR FIVE MORE THIS WAY.

15 Q. THOSE WERE THE ONES THAT DIDN'T HAVE ANY CARS IN
16 THEM?

17 A. YEAH, LIKE A COUPLE OF THEM WERE EMPTY. I THINK
18 THE FIRST ONES WERE EMPTY. FIRST ONES TO THE THIRD ONE, I
19 THINK, WERE EMPTY, AND THEN THERE WERE CARS AROUND THEM.

20 Q. OKAY. SO WHEN YOU EXITED THE VEHICLE, YOU HEARD A
21 NOISE AND YOU LOOKED UP --

22 ~~A~~ A. NO, I DIDN'T HEAR A NOISE.

23 Q. OH, YOU DIDN'T HEAR A NOISE?

24 ~~A~~ A. NO, MY BROTHER'S THE ONE THAT HEARD THE NOISE.

25 Q. SO YOU HEARD, OR YOU SAW --

26 A. I SAW SOMEBODY LIKE THAT.

27 Q. YOU SAW SOMETHING IN THE AREA WHERE YOU HAVE MARKED
28 "1" AND "2"; IS THAT CORRECT?

1 A. NO, HE WAS OVER HERE, THE GUYS ARE. HE WAS NOT
2 AROUND THE TRUCK.

3 Q. HE WASN'T AROUND THE JETTA OR THE PICKUP TRUCK?

4 A. AT THE MOMENT, NO. HE WAS OVER HERE. THE ONE I
5 SAW, THE ONE I FIRST SAW, HE WAS LIKE WATCHING OUT.

6 Q. WELL, WAS HE BY A VEHICLE?

7 A. YEAH, HE WAS BY THE 4RUNNER.

8 Q. THE 4RUNNER? OKAY. WELL WHY DON'T YOU MARK --

9 A. I GUESS IT WOULD BE A "4" FOR THAT ONE, RIGHT?

10 Q. OKAY. WE'RE AT "4"? "4" FOR THE 4RUNNER. OKAY.

11 THE COURT: RECORD WILL REFLECT HE HAS PLACED A "4"
12 ON THE DIAGRAM.

13 BY MR. SANCHEZ:

14 Q. SO WHEN YOU LOOK UP AND YOU LOOK TOWARDS THE
15 DIRECTION OF NUMBER 4, YOU SAW AN INDIVIDUAL, CORRECT?

16 A. YES, SIR.

17 Q. OKAY. THEN YOU STARTED TO GO TO THE APARTMENT AND
18 CALL 911?

19 A. NO, I TOLD MY BROTHER, "SOMEBODY'S THERE."

20 Q. OKAY. AFTER YOU TALKED TO ANGEL, DID YOU THEN TELL
21 YOUR WIFE TO GO TOWARDS THE APARTMENT?

22 A. YES.

23 Q. AND YOU FOLLOWED HER TO THE APARTMENT, CORRECT?

24 A. YES, SIR.

25 Q. OKAY. SO AT SOME POINT IN TIME -- ALL RIGHT. ONCE
26 YOU STARTED HEADING TOWARDS THE APARTMENT, DID YOU -- COULD
27 YOU SHOW US WHERE YOU WERE ON THIS DIAGRAM WHEN YOU HEARD THE
28 NOISE THAT YOU BELIEVE WAS A SHOT. WERE YOU INSIDE THE

1 APARTMENT?

2 A. NO, I WASN'T. I WAS AT THE DOOR. DO YOU WANT ME
3 TO MARK IT?

4 Q. NO, THAT'S NOT NECESSARY. YOU WERE AT THE DOOR OF
5 THE APARTMENT WHEN YOU HEARD IT; IS THAT CORRECT?

6 A. YES.

7 Q. OKAY. SO IT TOOK AT LEAST THE TIME THAT IT TOOK
8 FOR YOU TO GO FROM YOUR VEHICLE TO THE FRONT DOOR OF THE
9 APARTMENT BEFORE YOU HEARD THAT NOISE; IS THAT CORRECT?

10 A. WELL, I GUESS SO.

11 Q. WELL --

12 A. HOW WAS I GOING TO GET FROM THERE TO THERE? YEAH.
13 YES.

14 MR. SANCHEZ: THANK YOU, MR. HERRERA. I HAVE NO
15 FURTHER QUESTIONS.

16 THE COURT: ANY REDIRECT?

17 **REDIRECT EXAMINATION**

18 BY MS. ROACH:

19 Q. MR. HERRERA, YOU'VE INDICATED THAT YOU DON'T RECALL
20 EXACTLY WHAT YOU TOLD THE POLICE THE NIGHT THIS INCIDENT
21 HAPPENED; IS THAT CORRECT?

22 A. UH-HUH.

23 Q. AS YOU SIT HERE TODAY, DO YOU HAVE A DISTINCT
24 MEMORY OF SEEING A LIGHT AT THE SAME TIME THAT YOU HEARD WHAT
25 YOU BELIEVE WAS A GUNSHOT?

26 THE COURT: IS THAT A YES?

27 BY MS. ROACH:

28 Q. IS THAT A YES?

1 A. YES. SORRY.

2 MS. ROACH: THANK YOU. I HAVE NOTHING FURTHER.

3 THE COURT: ANYTHING FURTHER?

4 MR. LEAHY: JUST A FEW, YOUR HONOR.

5 RECROSS EXAMINATION

6 BY MR. LEAHY:

7 Q. DO YOU REMEMBER AT SOME POINT, MR. HERRERA, THAT
8 YOUR FRIEND ANGEL --

9 A. HE'S NOT MY FRIEND, HE'S MY BROTHER.

10 Q. -- YOUR BROTHER, ANGEL, SAID THAT HE WAS GOING TO
11 GO TELL THE OWNER OF THE JETTA THAT SOMEONE WAS BREAKING INTO
12 IT?

13 A. I TOLD HIM TO GO TELL HER.

14 MS. ROACH: BEYOND THE SCOPE OF REDIRECT.

15 THE COURT: SUSTAINED.

16 MR. LEAHY: MAY I TAKE HIM BACK ON
17 CROSS-EXAMINATION, YOUR HONOR?

18 THE COURT: WELL, ARE YOU GOING TO ASK THAT HE BE
19 SUBJECT TO RECALL LATER?

20 MR. LEAHY: PROBABLY. YES, I WILL.

21 THE COURT: OKAY. ANYTHING FURTHER?

22 MR. LEAHY: MAY I INQUIRE ON THIS LINE OF -

23 THE COURT: WELL, IT'S BEYOND THE SCOPE.

24 MS. ROACH: YOUR HONOR, OUT OF CONCERN FOR THIS
25 WITNESSES SCHEDULING, IF MR. LEAHY IS PLANNING ON RECALLING
26 HIM, I DON'T HAVE ANY PROBLEM WITH HIM GOING INTO HIS PART OF
27 THE CASE AT THIS POINT IN TIME IF HE WANTS TO TAKE THIS
28 WITNESS ON DIRECT AT THIS POINT.

1 THE COURT: ALL RIGHT. WITH THAT OFFER, YOU MAY
2 PROCEED.

3 MR. LEAHY: THE ONLY PROBLEM WITH THAT IS I THINK I
4 NEED HIM ON RECALL ANYWAY, YOUR HONOR.

5 THE COURT: WELL, OKAY. ALL RIGHT. WELL,
6 OBJECTION SUSTAINED.

7 MR. LEAHY: THANK YOU. THEN ASK THAT THE WITNESS
8 NOT BE EXCUSED.

9 THE COURT: ALL RIGHT. ANYTHING FURTHER,
10 MR. SANCHEZ?

11 MR. SANCHEZ: NO, YOUR HONOR.

12 THE COURT: ALL RIGHT. MR. HERRERA, YOU ARE
13 SUBJECT TO BEING RECALLED. WE DON'T KNOW EXACTLY WHEN THAT
14 MAY BE, BUT YOU'RE STILL SUBJECT TO RECALL. THANK YOU VERY
15 MUCH.

16 MS. ROACH: AND YOUR HONOR, IF I CAN JUST ASK THE
17 COURT'S PERMISSION THAT I CONTACT MR. HERRERA TO COME BACK TO
18 COURT SO HE DOESN'T HAVE TO WAIT FOR THE REMAINDER OF THE
19 PEOPLE'S CASE?

20 THE COURT: YES. OKAY. THANK YOU. YOU MAY STEP
21 DOWN.

22 THE WITNESS: OKAY.

23 MS. ROACH: YOUR HONOR, IF WE COULD APPROACH
24 BRIEFLY?

25 (SIDEBAR CONFERENCE, NOT REPORTED.)

26 THE COURT: ALL RIGHT. COUNSEL, DID YOU HAVE A
27 MOTION?

28 MR. SANCHEZ: YES, YOUR HONOR. AT THIS POINT,

COURT OF APPEAL -- STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA,	)	FROM SAN DIEGO COUNTY
PLAINTIFF AND RESPONDENT,	)	HON. ESTEBAN HERNANDEZ,
	)	JUDGE
VS.)	
)	
JAVIER RODRIGUEZ,	)	APPEAL NO. D043198
DEFENDANT AND APPELLANT.)	NO. SCS176087

REPORTER'S TRANSCRIPT ON APPEAL

AUGUST 12, 2003

SAN DIEGO, CALIFORNIA

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APPEARANCES:

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SAN DIEGO, CA. 92101

FOR THE DEFENDANT AND APPELLANT: JAVIER RODRIGUEZ
IN PRO PER

REPORTED BY: IRENE PERKINS, CSR 12727

1 AGAIN, LADIES AND GENTLEMEN, I'LL ADMONISH YOU, IT IS
2 YOUR DUTY NOT TO CONVERSE AMONGST YOURSELVES OR WITH ANYONE
3 ELSE ON ANY SUBJECT CONNECTED WITH THE TRIAL, OR TO FORM OR
4 EXPRESS ANY OPINION UNTIL THE CASE IS FINALLY SUBMITTED TO
5 YOU. 15 MINUTE BREAK.

6 (RECESS.)

7 THE COURT: ALL RIGHT. PEOPLE MAY CALL THEIR NEXT
8 WITNESS.

9 MS. ROACH: JUDGE, CAN WE APPROACH SIDEBAR FOR JUST
10 BRIEFLY?

11 THE COURT: DO YOU WANT THE REPORTER?

12 MS. ROACH: NO.

13 (SIDEBAR CONFERENCE, NOT REPORTED.)

14 MS. ROACH: THANK YOU. PEOPLE CALL INVESTIGATOR
15 PETER MARTINEZ.

16
17 PETER MARTINEZ,
18 HAVING BEEN FIRST DULY ADMINISTERED AN OATH IN ACCORDANCE
19 WITH CODE OF CIVIL PROCEDURE SECTION 2094, WAS EXAMINED AND
20 TESTIFIED AS FOLLOWS:

21
22 THE CLERK: PLEASE STATE YOUR FULL NAME AND SPELL
23 YOUR LAST NAME FOR THE RECORD.

24 THE WITNESS: MY NAME IS PETER MARTINEZ,
25 M-A-R-T-I-N-E-Z.

26 THE COURT: YOU MAY PROCEED.

27 //

28 //

DIRECT EXAMINATION

1
2 BY MS. ROACH:

3 Q. INVESTIGATOR MARTINEZ, HOW ARE YOU CURRENTLY
4 EMPLOYED?

5 A. I'M CURRENTLY EMPLOYED WORKING WITH THE SAN DIEGO
6 COUNTY DA'S OFFICE.

7 Q. AND WHAT IS THE JOB TITLE THAT YOU HAVE RIGHT NOW?

8 A. I'M A CRIMINAL INVESTIGATOR ASSIGNED TO THE GANG
9 PROSECUTION UNIT.

10 Q. HOW LONG HAVE YOU WORKED WITH THE DISTRICT
11 ATTORNEY'S OFFICE?

12 A. APPROXIMATELY 18 MONTHS.

13 Q. HOW MUCH OF THAT TIME HAS BEEN SPENT IN THE GANG
14 UNIT?

15 A. THE ENTIRE 18 MONTHS.

16 Q. PRIOR TO YOUR EMPLOYMENT WITH THE DISTRICT
17 ATTORNEY'S OFFICE, WERE YOU A LAW ENFORCEMENT OFFICER?

18 A. YES, I WAS.

19 Q. COULD YOU PLEASE DESCRIBE FOR US WHAT YOUR PRIOR
20 EXPERIENCE IS.

21 A. 1984 I WAS HIRED BY THE SAN DIEGO COUNTY SHERIFF'S
22 DEPARTMENT. FROM 1984 THROUGH 1987 I WORKED AT THE SOUTHBAY
23 JAIL HERE IN THE CITY OF CHULA VISTA. FROM 1987 TO 1997 I
24 WORKED AT ONE OF THE SHERIFF'S PATROL STATIONS DOWN IN THE
25 CITY OF IMPERIAL BEACH. FROM 1997 I WAS REASSIGNED AS A GANG
26 INVESTIGATOR. I WORKED UP IN NORTH SAN DIEGO IN THE CITY OF
27 SAN MARCOS. I WORKED THERE FROM APPROXIMATELY 1997 TO 1999.
28 FROM 1999 I RETURNED TO THE CITY OF IMPERIAL BEACH AND I

1 CONTINUED AS A GANG INVESTIGATOR FROM 1999 UNTIL THE YEAR
2 2002 WHERE THEN I CAME TO THE DISTRICT ATTORNEY'S OFFICE.

3 Q. NOW, WHEN YOU WERE FIRST EMPLOYED BY THE SHERIFF'S
4 DEPARTMENT WORKING IN THE JAILS, DID YOU COME INTO CONTACT
5 WITH GANG MEMBERS ON A REGULAR BASIS?

6 A. YES, I DID.

7 Q. AND, SIMILARLY, WHEN YOU WERE WORKING IN THE
8 IMPERIAL BEACH STATION, DID YOU BECOME FAMILIAR WITH SOUTHBAY
9 GANG MEMBERS?

10 A. YES, I DID.

11 Q. AND THIS AREA OF SOUTHBAY, I'M REFERRING TO GANG
12 MEMBERS FROM NATIONAL CITY, CHULA VISTA, SAN YSIDRO, AND
13 IMPERIAL BEACH. WOULD YOU SEE PEOPLE FROM ALL OF THOSE AREAS
14 IN THE IMPERIAL BEACH AREA?

15 A. YES, WE DID.

16 Q. AND HOW CLOSE IS SAN YSIDRO TO THE IMPERIAL BEACH
17 SHERIFF'S STATION?

18 A. THE BOUNDARIES OF THE CITY OF IMPERIAL BEACH IS SAN
19 YSIDRO. THERE'S ANOTHER TWO SMALLER COMMUNITIES IN-BETWEEN
20 SAN YSIDRO AND THE CITY OF IMPERIAL BEACH.

21 Q. IS IT FAIR TO SAY THAT WHILE YOU WORKED AT THE
22 IMPERIAL BEACH ON PATROL THAT YOU CAME INTO CONTACT WITH SAN
23 YSIDRO GANG MEMBERS ON A FAIRLY REGULAR BASIS?

24 A. YES.

25 Q. AND IN YOUR 5 YEARS -- IT WAS ABOUT 5 YEARS AS A
26 GANG INVESTIGATOR?

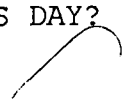
27 A. CORRECT.

28 Q. WHAT WAS YOUR PRIMARY DUTY?

1 A. AS WHEN I WAS ASSIGNED WITH THE SHERIFF'S
2 DEPARTMENT GANG UNIT MY PRIMARY GOAL WAS TO HANDLE ALL
3 GANG-RELATED CRIMES THAT CAME IN FROM EITHER PATROL OR EITHER
4 WE WERE CALLED OUT BECAUSE A CRIME HAD OCCURRED WHICH WE
5 NEEDED GANG INVESTIGATORS TO CONTINUE ON WITH THE
6 INVESTIGATION. ANOTHER THING THAT WE DID WAS THAT WE
7 MONITORED AND ALSO IDENTIFIED GANG MEMBERS THAT WERE COMING
8 INTO THE SPECIFIC GANGS. BECAUSE I WORKED OUT OF THE
9 IMPERIAL BEACH STATION, MY PRIMARY DUTY WAS TO MONITOR THE
10 GANG MEMBERS FROM THE IMPERIAL STREET GANG. BECAUSE I ALSO
11 WORKED IN THE LINCOLN ACRES AREA OVER THERE BY NATIONAL CITY,
12 WE ALSO HAVE LINCOLN ACRES STREET GANG THAT WE ALSO
13 MONITORED. WE ALSO MONITORED THE SOUTHEAST LOCOS.

14 NOW, WHAT HAPPENED DURING -- DURING THE TIME THAT --
15 WHEN YOU'RE MONITORING, OF COURSE, YOU HAVE GANG RIVALS
16 OCCURRING, OR GANGS EITHER FROM IMPERIALS WOULD GO TO WHAT I
17 CALL THE SISTER COMMUNITIES LIKE NESTOR, DEL SOL, SAN YSIDRO,
18 NATIONAL CITY, CHULA VISTA, AND COMMIT CRIMES AND THEN RETURN
19 TO THEIR OWN TURF AREA. OR WHAT WOULD HAPPEN IS THAT GANG
20 MEMBERS WOULD COME INTO IMPERIAL BEACH AND HAVE AN EITHER
21 RIVAL GANG FIGHT OR HAVE A GANG CRIME THAT OCCURRED WITHIN
22 THE CITY. SO WE ALSO WOULD KEEP IN CONTACT WITH THE LOCAL
23 GANG INVESTIGATOR FROM THOSE SPECIFIC AREAS SUCH AS CHULA
24 VISTA AND NATIONAL CITY AND SAN DIEGO POLICE DEPARTMENT SO WE
25 CAN -- EVERYBODY THEN CAN KEEP AWARE OF WHAT'S GOING ON.

26 Q. NOW, WITH REGARD TO THESE -- I'LL CALL THEM
27 INTELLIGENCE MEETINGS -- ARE THOSE SOMETHING THAT YOU
28 REGULARLY ATTEND TO THIS DAY?



1 A. THE MEETINGS AND THE -- I MEAN, WE'RE ALSO
2 CONTINUOUSLY KEEPING IN TOUCH WITH LOCAL LAW ENFORCEMENT FROM
3 OUR LOCAL SISTER COMMUNITIES TO KEEP OURSELVES UPDATED ON
4 THE -- ON THE GANG SITUATION.

5 Q. AND MORE THAN JUST IN AN INFORMAL SETTING, DO YOU
6 ALSO ATTEND FORMAL GANG INTELLIGENCE MEETINGS ON A MONTHLY
7 BASIS?

8 A. YES, I DO.

9 Q. DO YOU ATTEND BOTH ONES FOR THE COUNTY OF SAN DIEGO
10 AS WELL AS FOR THE SOUTHBAY AREA SPECIFICALLY?

11 A. YES, I DO.

12 Q. AND PRIOR TO OR DURING YOUR TRAINING AS A GANG
13 INVESTIGATOR, DID YOU RECEIVE ANY SPECIAL EDUCATION IN THE
14 AREA OF GANG DOCUMENTATION MEMBERSHIP?

15 A. YES, I DID.

16 Q. CAN YOU PLEASE DESCRIBE THAT FOR US BRIEFLY.

17 A. I HAVE APPROXIMATELY OVER 200 HOURS OF SEMINARS AND
18 GANG CONFERENCES THAT I HAVE ATTENDED. I AM A MEMBER OF THE
19 CALIFORNIA GANG INVESTIGATORS ASSOCIATION. I'M ALSO A MEMBER
20 OF THE CALIFORNIA NARCOTICS OFFICERS ASSOCIATION, WHICH ALSO
21 THEY HAVE CLASSES WHICH DEALS WITH GANGS AND DRUGS.

22 Q. DO YOU KEEP UP-TO-DATE ON CURRENT PUBLICATIONS PUT
23 OUT BY THOSE ORGANIZATIONS, BOTH CALIFORNIA GANG
24 INVESTIGATORS AND CALIFORNIA NARCOTICS OFFICERS ASSOCIATION?

25 A. YES.

26 Q. AND DO YOU ALSO HAVE AS PART OF YOUR CURRENT DUTIES
27 AS AN INVESTIGATOR FOR THE DISTRICT ATTORNEY'S OFFICE TO BE
28 AWARE OF WHAT THE CURRENT TRENDS ARE IN GANG ACTIVITY IN THE

1 SOUTHBAY AREA?

2 A. YES, I DO.

3 Q. AND, SPECIFICALLY, DO YOU WORK WITH A DA WHO
4 HANDLES SOLELY GANG-RELATED VIOLENCE CASES?

5 A. YES, I DO.

6 Q. AND IS THAT MYSELF?

7 A. YES, IT IS.

8 Q. NOW, WITH REGARD TO DOCUMENTATION OF A GANG MEMBER,
9 IS THERE ANY KIND OF A CENTRALIZED SYSTEM FOR DOING THAT
10 THROUGHOUT THE STATE?

11 A. WE HAVE WHAT WE CALL A CAL/GANG DATABASE WHICH IS A
12 DATABASE WHERE ALL THE GANG INVESTIGATORS THAT HAVE PASSED
13 THE COURSE CAN PLACE THEIR GANGS AND THEIR -- AND THEIR
14 DOCUMENTED GANG MEMBERS INTO THE SYSTEM. BASICALLY, WHAT IT
15 IS, IT'S FOR US TO KEEP UPDATED ON INFORMATION, RESIDENCY,
16 TATOOS, VEHICLES, AND ALL OF THAT TYPE OF INFORMATION.

17 Q. WHO ORCHESTRATES THAT DATABASE, OR WHO MANAGES IT?

18 A. THE CAL/GANG COORDINATOR, OR THE COORDINATION
19 AGENCY IS SAN DIEGO POLICE DEPARTMENT.

20 Q. AND ARE THERE ADDITIONAL AGENCIES IN OTHER COUNTIES
21 THAT MANAGE CAL/GANG DATABASES FOR THOSE COUNTIES?

22 A. YES.

23 Q. SO FOR INSTANCE, LOS ANGELES COUNTY HAS ITS OWN
24 ORGANIZER?

25 A. LOS ANGELES DOJ. AND THERE'S ONE FURTHER UP NORTH
26 THAT ASSIST WITH THE NORTHERN PART OF CALIFORNIA.

27 Q. AND WHO SETS UP THE GUIDELINES FOR CAL/GANGS?

28 A. WELL, THE GUIDELINES FOR DOCUMENTING GANG AND

1 DOCUMENTING A GANG MEMBER CAME FROM DOJ.

2 Q. AND ARE THOSE -- WHEN YOU SAY "DOJ", YOU MEAN THE
3 DEPARTMENT OF JUSTICE?

4 A. DEPARTMENT OF JUSTICE.

5 Q. AND THOSE GUIDELINES ARE -- IS COMPLIANCE WITH
6 THOSE GUIDELINES REQUIRED IN ORDER FOR AN AGENCY TO INPUT
7 INFORMATION INTO CAL/GANGS?

8 A. YES.

9 Q. AND DOES AN INDIVIDUAL WHO IS ENTERING THAT
10 INFORMATION HAVE TO BE SPECIFICALLY TRAINED BY A DEPARTMENT
11 OF JUSTICE CERTIFIED CLASS BEFORE THEY CAN EVEN PUT ANYTHING
12 INTO CAL/GANGS?

13 A. CORRECT.

14 Q. NOW, WITH REGARD TO CAL/GANG DOCUMENTATION, CAN YOU
15 TELL US WHAT CAL/GANGS REQUIRES BEFORE A PERSON CAN BE PUT IN
16 AS A GANG MEMBER?

17 A. IN ORDER FOR A PERSON TO BE DOCUMENTED AS A GANG,
18 THERE IS APPROXIMATELY FIVE CRITERIAS THAT ARE LISTED. ONE
19 IS THAT THE PERSON BASICALLY ADMITS HE IS A GANG MEMBER. HE
20 BASICALLY ADMITS TO LAW ENFORCEMENT AND HE SAYS, "I'M SO AND
21 SO." WHEN I MEAN SO AND SO, I'M TALKING ABOUT A MONIKER THAT
22 HE GIVES, OR A STREET NAME THAT HE GIVES. "I CLAIM SIDRO,"
23 OR, "I CLAIM DEL SOL."

24 THE SECOND CRITERIA IS THAT THE PERSON IS CONTACTED
25 WITH -- EITHER HAS TATOOS ON THEM, HAS PARAPHERNALIA THAT IS
26 ASSOCIATING TO THAT SPECIFIC GANG, ALSO, CLOTHING. WHEN I'M
27 TALKING ABOUT PARAPHERNALIA, SOMETIME THEY HAVE CLOTHING THAT
28 SAYS "DEL SOL" OR "SIDRO" OR "IMPERIALS" ON IT. SO,

1 BASICALLY, THEY ARE COMMUNICATING TO THE OUTSIDE PUBLIC THAT,
2 "I'M FROM THIS PARTICULAR GANG."

3 THE THIRD THING IS POLICE OBSERVATION. IT'S WHAT WE
4 CALL FIELD INTERVIEW REPORTS. THOSE ARE WHEN LAW ENFORCEMENT
5 CONTACTS SOMEBODY IN A SPECIFIC AREA AND THEY JUST GET
6 GENERAL INFORMATION FROM THE PERSON. AND THOSE FIELD AND
7 INTERVIEW REPORTS HAVE DATES, ADDRESSES WHERE THE CONTACT WAS
8 MADE, THE TIME THE PERSON WAS CONTACTED, AND SOMETIMES THEIR
9 MONIKER IS PLACED IN THERE, AND INFORMATION LIKE DRIVER'S
10 LICENSE, SOCIAL SECURITY NUMBER, THE RESIDENCE OF WHERE THE
11 PERSON LIVES, AND THEN ALSO COMPANIONS WHO WAS WITH THIS
12 PERSON. BUT THEN, ALSO, THERE IS SOME LINES, ALMOST LIKE A
13 BOX, WHERE THE OFFICER CAN WRITE A LITTLE, YOU KNOW -- YOU
14 KNOW, A LITTLE SYNOPSIS, SMALL SYNOPSIS OF WHAT THE CONTACT
15 WAS ABOUT OR IF, SAY, THIS PERSON CLAIMED TO ME, "I'M SO AND
16 *ref so* SO FROM THIS SPECIFIC GANG." AND THEN THE OFFICER HAS WHERE
17 HE PUTS HIS NAME AND HIS I.D. AND THE AGENCY.

18 ALSO, POLICE REPORTS, IF THE POLICE REPORTS ARE THAT
19 EITHER HE IS A VICTIM OF A CRIME. LET'S SAY THERE'S A RIVAL
20 GANG SITUATION THAT HAPPENS AND HE SAYS, "WELL, SO AND SO
21 FROM THE OTHER GANG DID IT BECAUSE I'M SO AND SO FROM THIS
22 GANG." ALSO, LIKE I SAID, POLICE OBSERVATIONS, POLICE
23 REPORTS, BEING ARRESTED WITH OTHER DOCUMENTED GANG MEMBERS
24 FROM WITHIN THEIR OWN GANG.

25 AND THE OTHER ONE IS -- WELL, THE FIELD INTERVIEWS
26 OBSERVATIONS IS CRITERIA THREE, THE ARRESTS ARE CRITERIA
27 FOUR, AND THE FIFTH CRITERIA IS A -- IF A SEPARATE PERSON
28 ADVISES US THAT HE IS A GANG MEMBER FROM A CERTAIN AREA GANG.

1 AND IT COULD BE ANYONE. IT COULD BE A NEIGHBOR, IT COULD BE
2 A RELATIVE, IT COULD BE, YOU KNOW, SOMEBODY FROM A SCHOOL.
3 YOU KNOW, PUBLIC IDENTITY. *Acquaintance*

4 SO OUT OF THOSE FIVE CRITERIA, THEY DON'T HAVE TO MEET
5 ALL FIVE. THEY CAN MEET, SAY, THREE OF THE FIVE, OKAY? AND
6 I'M GOING TO TALK ABOUT HOW WE DID IT AT THE SHERIFF'S
7 DEPARTMENT. WE DID THREE INDIVIDUAL CONTACTS, OKAY? SO IF
8 ONE CONTACT WAS, OKAY, HE WAS CONTACTED BY HIMSELF BUT HAD
9 PARAPHERNALIA BY CLOTHING OR PHONEBOOK THAT SAID "SIDRO" ON
10 IT OR SOMETHING, OKAY, THAT WOULD BE ONE CONTACT. AND THE
11 SECOND CONTACT HE WOULD BE WITH SOMEBODY ELSE. HE'S
12 CONTACTED WITH A FELLOW GANG MEMBER. THAT'S CONTACT TWO.
13 CONTACT THREE COULD BE SOME TYPE OF ARREST, OKAY, WITH A
14 FELLOW GANG MEMBER, OKAY? THOSE ARE THREE CONTACTS. THAT
15 THIRD CONTACT IS WHEN WE WOULD HAVE ENOUGH DOCUMENTATION TO
16 DOCUMENT HIM AS A GANG MEMBER.

17 Q. WHAT DOES CAL/GANGS REQUIRE?

18 * A. CAL/GANGS REQUIRES TWO. *= Protection*
vio. 5

19 Q. AND ARE THERE SOME AGENCIES THAT ONLY COMPLY WITH
20 THE TWO WITH THAT STANDARD RATHER THAN THE THREE?

21 A. CORRECT. THE SHERIFF'S DEPARTMENT. WE WANTED TO
22 BE SURE, SO WE ADDED THE THIRD ONE.

23 Q. AND WHAT ABOUT THE SAN DIEGO POLICE DEPARTMENT, DO
24 THEY ALSO USE THREE CONTACTS PRIOR TO PUTTING PEOPLE INTO
25 CAL/GANGS?

26 * A. I BELIEVE THEY USE THE TWO.

27 Q. THEY USE THE TWO?

28 A. CORRECT.

1 Q. AND WITH REGARD TO CAL/GANGS INFORMATION, DOES IT
2 STAY IN THE SYSTEM INDEFINITELY, OR IS IT PURGED OUT AFTER A
3 CERTAIN AMOUNT OF INACTIVITY?

4 A. ONCE A PERSON IS DOCUMENTED AS A GANG MEMBER, AS
5 THE PERSON IS STILL INVOLVED IN SOME TYPE OF CRIMINAL STREET
6 GANG ACTIVITY, THEN HE IS CONTINUALLY BEING MONITORED. IF
7 FOR AT ONE TIME -- AND I'M JUST GOING TO LOOK. I'M JUST
8 GOING TO GIVE YOU JUST AS EXAMPLE, IF THE PERSON IS BEING --
9 FINISHES BEING CONTACTED, OR STOPS BEING CONTACTED AT THE
10 YEAR 2000, OKAY, AND AT 2002 HE HAS NO MORE CONTACTS, OKAY,
11 EITHER IN THE FIELD OR IF HE IS, YOU KNOW, ACTUALLY IN THE
12 PRISON OR IN THE JAIL, THEN WHAT WE DO IS WE PLACE THEM ON AN
13 INACTIVITY STATUS, OKAY.

14 NOW, IN ORDER TO BE PURGED, YOU HAVE TO HAVE THREE
15 ADDITIONAL YEARS. ~~SO YOU HAVE TO HAVE A TOTAL OF FIVE, OKAY?~~
16 SO YOUR ~~FIRST TWO YEARS ARE INACTIVE~~, AND THEN ~~IF HE HAS NO~~
17 ~~SEE CONTACTS OR ANYTHING~~ THAT SHOWS THAT HE'S CONTINUED TO
18 BE WITH THE GANG, ~~THEN~~ IT'S A TOTAL OF FIVE. ~~AND AT THE~~
19 ~~TWO YEAR, HIS INFORMATION GETS PURGED FROM THE SYSTEM.~~

20 Q. IS IT FAIR TO SAY, THOUGH, THAT AFTER TWO YEARS
21 THERE WILL BE SOME INDICATION FROM CAL/GANGS DATABASE IF THE
22 PERSON IS INACTIVE IF THEY HADN'T BEEN CONTACTED IN THAT TWO
23 YEAR PERIOD?

24 ~~Q.~~ YES. ACTUALLY, IN CAL/GANG, WE CAN MARK IF EITHER
25 THE PERSON IS ACTIVE OR INACTIVE.

26 Q. NOW, AGENCIES THAT TAKE ADVANTAGE OF THE CAL/GANG
27 SYSTEM, DO THEY HAVE TO BE AUDITED TO MAKE SURE THAT THEY ARE
28 COMPLYING WITH THE PROPER DOCUMENTATION AND BACKGROUND

1 INFORMATION TO SUPPORT WHAT THEY'RE ENTERING INTO THE SYSTEM?

2 A. [REDACTED].

3 Q. AND IF THEY ARE NOT IN COMPLIANCE AT THE TIME OF
4 THEIR AUDIT, CAN THEY ESSENTIALLY HAVE THEIR CAL/GANG
5 PRIVILEGES REMOVED?

6 A. [REDACTED].

7 Q. THEY WILL NOT BE ALLOWED TO ENTER INFORMATION OR
8 RETRIEVE INFORMATION?

9 A. CORRECT.

10 Q. NOW, WITH REGARD TO GANGS IN THE SOUTHBAY, ARE YOU
11 FAMILIAR WITH A GANG THAT CALLS ITSELF "SIDRO"?

12 A. YES, I AM.

13 Q. CAN YOU PLEASE TELL US, DOES SIDRO -- IS IT A
14 TRADITIONAL GANG IN THE SENSE THAT IT FITS DEFINITIONS
15 PROVIDED BY BOTH PENAL CODE SECTION 18622, AS WELL AS BY THE
16 DOJ DEFINITION OF WHAT A GANG IS?

17 A. YES.

18 Q. AND, APPROXIMATELY, WHEN DID SIDRO BEGIN TO BE
19 DOCUMENTED BY LAW ENFORCEMENT?

20 A. WELL, SIDRO WAS DOCUMENTED BY THE SAN DIEGO POLICE
21 DEPARTMENT IN 1994.

22 Q. NOW, THAT'S THE FIRST DATE OF DOCUMENTATION. ARE
23 YOU AWARE OF WHETHER OR NOT THE GANG WAS IN EXISTENCE PRIOR
24 TO THAT?

25 A. YES, I DO.

26 Q. AND THE DATE OF DOCUMENTATION SIMPLY REFLECTS WHEN
27 THE POLICE DEPARTMENT STARTED COLLECTING DATA ON THE GANG IN
28 ORDER TO ENTER IT INTO CAL/GANGS; IS THAT CORRECT?

1 A. CORRECT.

2 Q. DO YOU KNOW APPROXIMATELY HOW MANY MEMBERS THE
3 SIDRO GANG CURRENTLY HAS?

4 ~~X~~ A. THEY CURRENTLY HAVE 225 GANG MEMBERS.

5 Q. AND THESE ARE ALL INDIVIDUALS WHO HAVE AT A MINIMUM
6 TWO CONTACTS WHERE THEY SATISFIED ONE OF THE FIVE CRITERIA;
7 IS THAT CORRECT?

8 A. CORRECT.

9 Q. DOES THE SIDRO GANG HAVE ANY PARTICULAR BOUNDARIES
10 WITHIN SAN DIEGO COUNTY?

11 A. SIDRO GANG IS MOSTLY IN THE SAN YSIDRO COMMUNITY.
12 THE BOUNDARIES THAT HAVE BEEN SET ARE, TO THE SOUTH WOULD BE
13 THE BORDER, TO THE NORTH WOULD BE 905, TO THE WEST WOULD BE
14 THE BEACH, AND TO THE EAST WOULD BE WHAT THEY CALL OTAY --
15 THE OTAY BORDER. SO THOSE ARE YOUR PERIMETERS.

16 Q. AND DO YOU KNOW WHETHER OR NOT SIDRO GANG MEMBERS
17 MEET EITHER ON A FORMAL OR INFORMAL BASIS?

18 A. YES, I DO.

19 Q. ARE YOU FAMILIAR WITH SOME OF THE AREAS THAT SIDRO
20 GANG MEMBERS CONGREGATE AT?

21 A. YES.

22 Q. AND WHAT ARE SOME OF THE PRIMARY AREAS WHERE YOU
23 SEE SIDRO GANG MEMBERS CONGREGATE AT?

24 A. THERE'S A PARK AND A STREET ON SYCAMORE.

25 Q. IS THAT CESAR CHAVEZ PARK?

26 A. YES, IT IS.

27 Q. AND IN ADDITION TO THE PARK, ARE THERE OTHER
28 LOCATIONS?

1 A. THERE'S OTHER LOCATIONS LIKE ON EAST PARK IN SAN
2 YSIDRO BOULEVARD IN THAT AREA.

3 Q. ARE THERE A NUMBER OF APARTMENT COMPLEXES WHERE
4 THERE HAVE BEEN REPEATED PROBLEMS OR CONTACTS WITH LAW
5 ENFORCEMENT AND GROUPS OF SIDRO GANG MEMBERS?

6 A. YES.

7 Q. AND ADDITIONALLY, IS THERE A RESIDENCE OR A SERIES
8 OF APARTMENTS ON 300 SYCAMORE WHERE YOU SEE ROUTINE
9 CONGREGATION OF GANG MEMBERS?

10 A. THAT'S WHERE I'VE NOTICED A MAJORITY OF THE
11 CONTACTS ARE, ON SYCAMORE.

12 Q. NOW, IN ORDER FOR A GANG TO MEET THE CRITERIA UNDER
13 * 186.22, IT HAS TO BE SHOWN THAT THEY HAVE A PRIMARY CRIMINAL
14 ACTIVITY. ARE YOU FAMILIAR WITH THE CRIMINAL ACTIVITY THAT
15 SIDRO GANG MEMBERS HAVE PARTICIPATED IN THE RECENT PAST?

16 MR. LEAHY: YOUR HONOR, IT'S A LEADING QUESTION,
17 AND I OBJECT TO COUNSEL TESTIFYING.

18 THE COURT: REPHRASE.

19 BY MS. ROACH:

20 Q. ARE YOU AWARE OF WHAT THE PRIMARY CRIMINAL
21 ACTIVITIES IS OF SIDRO GANG MEMBERS?

22 A. YES.

23 Q. AND CAN YOU PLEASE GIVE US WHAT YOU WOULD CONSIDER
24 THEIR PRIMARY CRIME?

25 A. WELL, I LOOK AT -- I LOOK AT RANGES, OKAY?
26 EVERYTHING FROM VANDALISM UP TO MURDER. SO THEY'VE --
27 THEY'VE MET AT LEAST ON ONE OCCASION THEY MET SOME TYPE
28 WITHIN THOSE BOUNDARIES. WE'RE TALKING ABOUT ASSAULTS, WE'RE

1 TALKING ABOUT EXTORTIONS, WE'RE TALKING ABOUT BURGLARIES,
2 NARCOTICS INVOLVEMENT, AND OTHER TYPES.

3 Q. HOW ABOUT OTHER THEFTS LIKE GRAND THEFT AUTO?

4 A. YES.

5 Q. AND WHAT ABOUT ROBBERIES?

6 A. YES.

7 Q. IN YOUR RESEARCH, DO YOU FIND THAT THERE IS ONE
8 CRIME THAT APPEARS TO STICK OUT MORE RECENTLY WITH MANY OF
9 THE SIDRO GANG MEMBERS THAN OTHERS?

10 MR. LEAHY: RELEVANCE. OBJECTION. RELEVANCE, YOUR
11 HONOR.

12 THE COURT: OVERRULED.

13 THE WITNESS: WHAT I HAVE NOTICED IN THE DATA THAT
14 I'VE GATHERED IS THAT SIDRO IS INVOLVED IN A LOT OF
15 ROBBERIES.

16 Q. AND THAT'S THE TAKING OF PROPERTY BY FORCE OR FEAR?

17 A. YES, IT IS.

18 Q. NOW, DOES THE SIDRO GANG HAVE A COMMON SIGN OR
19 SYMBOL?

20 A. S-Y FOR SAN YSIDRO.

21 Q. ARE THERE ALSO NUMBERS THAT YOU WILL ROUTINELY SEE
22 ASSOCIATED WITH THOSE LETTERS S-Y THAT REPRESENT THOSE
23 LETTERS?

24 A. 1925.

25 Q. WHAT DO THOSE REPRESENT?

26 A. THERE'S VARIOUS WAYS THAT GANGS CAN COMMUNICATE.
27 ONE OF THEM IS THROUGH EITHER GRAFFITI OR THROUGH TATOOS. IF
28 YOU, FOR INSTANCE, YOU TAKE THE ALPHABET A THROUGH Z. A WILL

*distinguishable
from Auto Burg.*

1 BE 1, B WILL BE 2, C WILL BE 3, DOWN ALL THE WAY, Y WILL BE
2 25, Z WILL BE 26. SO IF YOU TAKE THOSE LETTERS AND YOU PUT
3 EACH LETTER TO THOSE NUMBERS, THEN WHEN YOU SEE THESE NUMBERS
4 EITHER ON GRAFFITI OR TATOOS, THEY REPRESENT -- THEY MAKE UP
5 THOSE LETTERS FROM WHAT THEY REPRESENT FOR. IN OTHER WORDS,
6 S IS 19, Y IS 25. FOR SAN YSIDRO, YOU SEE A LOT OF 1904,
7 OKAY? S, 19 AND 4 IS D FOR SAN DIEGO, OKAY? THAT'S JUST ONE
8 WAY THAT -- THAT MEANS OF TYPE OF COMMUNICATION.

9 Q. AND BASED ON YOUR TRAINING AND EXPERIENCE, DO YOU
10 FIND THAT THE USE OF EITHER THE LETTERS S-Y, THE WORDS SAN
11 YSIDRO, THE WORD SIDRO, AND 1925, APPEAR COMMONLY IN TATOOS
12 AND CLOTHING WORN AND HAD BY SIDRO GANG MEMBERS?

13 A. YES.

14 Q. AND ALSO, THOUGH IT MAY SEEM OBVIOUS, DO THEY ALSO
15 HAVE A COMMON NAME? A COMMON NAME IN TERMS OF THE GANGS
16 NAME?

17 A. THE GANG, YES.

18 Q. AND THAT IS THE NAME SIDRO?

19 A. SIDRO.

20 Q. AND TO OTHER RIVAL GANG MEMBERS, IF YOU WERE SIMPLY
21 TO CALL OUT THE WORD "SIDRO" WHAT WOULD THAT COMMUNICATE?

22 A. IF I'M SAYING "SIDRO" TO A RIVAL GANG, YOU'RE
23 BASICALLY TELLING THAT GROUP OF PEOPLE WHERE YOU'RE FROM,
24 OKAY? BASICALLY, YOU'RE TELLING THEM, "HEY, I'M FROM SIDRO.
25 SO, YOU KNOW, I'M JUST LETTING YOU KNOW." SOMETIMES THOSE
26 GANGS WILL TALK BACK OR THEY WILL SAY WHERE THEY'RE FROM, AND
27 THEN THAT'S HOW ACTUALLY THERE'S A CHANCE OF YOUR
28 COMMUNICATION ESCALATING.

1 Q. WHEN YOU SAY ESCALATING, YOU MEAN IN TERMS OF AN
2 ASSAULT OR SOME OTHER TYPE OF VIOLENT ACTIVITY?

3 * A. CORRECT.

4 Q. NOW, WITH REGARDS TO THE SIDRO GANG, HAVE YOU BEEN
5 ABLE TO ESTABLISH WHETHER OR NOT THEY HAVE A PATTERN OF
6 CRIMINAL ACTIVITY BY DOING RESEARCH AND BEING AWARE OF THE
7 PREVIOUS CRIMINAL PROSECUTIONS AGAINST SIDRO GANG MEMBERS?

8 A. YES, I HAVE.

9 Q. SPECIFICALLY IN SEPTEMBER 26TH OF 2002, ARE YOU
10 AWARE THAT A DOCUMENTED SIDRO GANG MEMBER BY THE NAME SABAS
11 ALDANA WAS CONVICTED OF ROBBERY?

12 A. YES, HE WAS.

13 Q. AND ARE YOU ALSO AWARE THAT IN SEPTEMBER 20TH OF
14 2001, A DOCUMENTED SIDRO GANG MEMBER BY THE NAME OF OCTAVIO
15 MENDOZA WAS ALSO CONVICTED OF ROBBERY?

16 A. YES, HE WAS.

17 Q. AND ARE YOU ALSO AWARE THAT ON DECEMBER 15TH OF
18 1999, DEFENDANT JOSE LEON, A DOCUMENTED SIDRO GANG MEMBER,
19 WAS CONVICTED OF -- I'M SORRY -- WAS FOUND TRUE IN JUVENILE
20 COURT OF COMMITTING A ROBBERY?

21 MR. LEAHY: OBJECTION AS TO FOUNDATION, YOUR HONOR.
22 MOVE TO STRIKE THE ANSWER.

23 THE COURT: LAY THE FOUNDATION.

24 BY MS. ROACH:

25 Q. INVESTIGATOR MARTINEZ, HAVE YOU DONE ANY RESEARCH
26 IN ORDER TO TESTIFY IN THIS CASE HERE TODAY?

27 A. YES, I HAVE.

28 Q. AND IN DOING THAT RESEARCH, HAVE YOU GONE THROUGH

1 COPIES OF CERTIFIED PRIOR CONVICTIONS AND TRUE FINDINGS OF
2 EACH OF THE INDIVIDUALS YOU'RE TESTIFYING ABOUT?

3 A. YES, I HAVE.

4 Q. SHOWING YOU WHAT'S BEEN PREVIOUSLY MARKED AS
5 PEOPLES EXHIBIT 29, DO YOU RECOGNIZE THIS ITEM?

6 (PEOPLE'S EXHIBIT 29, CONVICTION RECORD, PC211,
7 2002, MARKED FOR IDENTIFICATION.)

8 A. YES, THIS IS THE CASE ON MR. SABAS ALDANA.

9 Q. AND DOES THAT SHOW THE CONVICTION THAT YOU JUST
10 TESTIFIED TO THAT OCCURRED IN SEPTEMBER OF 2002 FOR ROBBERY?

11 A. YES, IT IS.

12 Q. AND SHOWING YOU WHAT'S BEEN MARKED PEOPLE'S EXHIBIT
13 28, DO YOU RECOGNIZE THIS ITEM?

14 (PEOPLE'S EXHIBIT 28, CONVICTION RECORD, PC211,
15 2001, MARKED FOR IDENTIFICATION.)

16 A. YES, THIS IS THE ROBBERY CHARGE ON MR. MENDOZA.

17 Q. IT SHOWS A CONVICTION OF ROBBERY FROM SEPTEMBER
18 20TH, 2001?

19 A. YES.

20 Q. SHOWING YOU WHAT'S BEEN PREVIOUSLY MARKED AS
21 PEOPLES EXHIBIT 10, DO YOU RECOGNIZE THIS ITEM?

22 (PEOPLE'S EXHIBIT 10, JUVENILE RECORD, DEFENDANT
23 LEON, MARKED FOR IDENTIFICATION.)

24 A. THIS IS THE JUVENILE DOCUMENTATION ON MR. JOSE
25 LEON.

26 Q. AND DOES THAT JUVENILE DOCUMENTATION INDICATE THAT
27 THERE IS A TRUE FINDING FROM DECEMBER 15TH, 1999, FOR
28 ROBBERY?

1 MR. LEAHY: YOUR HONOR, I'M GOING TO OBJECT AND ASK
2 THE COURT TO GIVE A LIMITING INSTRUCTION AT THIS TIME.

3 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN, THERE
4 IS CERTAIN EVIDENCE THAT IS ADMITTED FOR A LIMITED PURPOSE,
5 AND THIS IS ONE OF THOSE. THE PURPOSE FOR WHICH THIS IS
6 ADMITTED IS SOLELY THE ALLEGATION OF PENAL CODE SECTION
7 186.22, SUBDIVISION B1, ATTACHED TO EACH OF THE COUNTS, AS
8 WELL AS FOR COUNTS 3 AND 4. SO THIS EVIDENCE IS ADMITTED
9 SOLELY FOR THAT ENHANCEMENT PURPOSE ATTACHED TO EACH COUNT
10 AND ALSO LIMITED FOR CONSIDERATION ON COUNTS 3 AND 4, AND NOT
11 TO BE CONSIDERED FOR ANY OTHER PURPOSE.

12 YOU MAY PROCEED.

13 BY MS. ROACH:

14 Q. AND ARE YOU ALSO AWARE THAT ON APRIL 22ND OF 1999,
15 THAT A DOCUMENTED GANG MEMBER, DEFENDANT JAVIER RODRIGUEZ,
16 WAS CONVICTED OF RESIDENTIAL BURGLARY?

17 A. YES.

18 Q. AND SHOWING YOU WHAT'S BEEN MARKED AS PEOPLE'S
19 EXHIBIT 8, DO YOU RECOGNIZE IT?

20 (PEOPLE'S EXHIBIT 8, CONVICTION RECORD, DEFENDANT
21 RODRIGUEZ, MARKED FOR IDENTIFICATION.)

22 A. YES, I DO.

23 Q. AND DOES THAT APPEAR TO BE A CERTIFIED COPY OF HIS
24 CONVICTION IN THAT MATTER?

25 A. YES.

26 Q. NOW, WITH REGARD TO THE IDENTIFICATION OF
27 MR. ALDANA AND OCTAVIO MENDOZA AS SIDRO GANG MEMBERS, WHAT
28 RESEARCH DID YOU DO TO DETERMINE WHETHER OR NOT THEY WERE

1 GANG MEMBERS?

2 A. MY RESEARCH COMPILED FROM INFORMATION GATHERED FROM
3 THE CAL/GANGS DATA SYSTEM.

4 Q. IN ADDITION, WERE YOU THE GANG INVESTIGATOR WHEN
5 MR. ALDANA WAS PROSECUTED?

6 A. YES.

7 Q. AND THAT WAS HERE IN THE SOUTHBAY COURT?

8 A. YES.

9 Q. AND WITH REGARD TO OCTAVIO MENDOZA, DID YOU RELY ON
10 PRIOR PROBATION REPORTS, CERTIFIED CONVICTIONS, AS WELL AS
11 CAL/GANGS INFORMATION?

12 A. YES, I DID.

13 Q. AND WERE YOU ABLE TO DETERMINE WHETHER OR NOT BOTH
14 MR. ALDANA AND MENDOZA HAVE THE REQUISITE NUMBER OF CONTACTS
15 IN ORDER TO DETERMINE THAT THEY WERE GANG MEMBERS?

16 A. YES, THEY DID.

17 Q. IN FACT, DID BOTH OF THEM HAVE MORE THAN WHAT WAS
18 REQUIRED BY THE DEPARTMENT OF JUSTICE?

19 A. MR. ALDANA DID, YES.

20 Q. AND SPECIFICALLY, HOW MANY CONTACTS DID MR. ALDANA
21 HAVE?

22 A. APPROXIMATELY OVER 17.

23 Q. AND ONE OF THOSE LAST CONTACTS WAS IN APRIL 27TH OF
24 THIS YEAR; IS THAT CORRECT?

25 A. YES.

26 Q. AND DURING THAT CONTACT, HE WAS ACTUALLY WITH
27 DEFENDANT JOSE LEON; IS THAT CORRECT?

28 A. YES, HE WAS.

1 * MR. LEAHY: OBJECTION, YOUR HONOR. MOVE TO STRIKE
2 ON RELEVANCE GROUNDS.

3 THE COURT: OVERRULED.

4 BY MS. ROACH:

5 Q. NOW, WITH REGARD TO DEFENDANT JAVIER RODRIGUEZ, IS
6 HE DOCUMENTED WITHIN THE CAL/GANGS SYSTEMS?

7 A. YES, HE IS.

8 Q. AND CAN YOU PLEASE TELL US WHAT FORM OF
9 DOCUMENTATION HAS BEEN USED TO DETERMINE WHETHER OR NOT
10 MR. RODRIGUEZ IS AN ACTIVE PARTICIPANT IN A CRIMINAL STREET
11 GANG?

12 * A. BY THE CAL/GANG SYSTEM, WHICH SAN DIEGO PD DOES THE
13 ENTRY, IT WAS BY FIELD INTERVIEWS.

14 Q. AND APPROXIMATELY HOW MANY FIELD INTERVIEWS WERE
15 THERE SHOWING CONTACTS WITH MR. RODRIGUEZ?

16 A. IF I CAN REFRESH MY MEMORY?

17 Q. IF IT WOULD HELP REFRESH YOUR RECOLLECTION.

18 * A. YES, IT WOULD. ON MR. RODRIGUEZ, REGARDING FIELD
19 INTERVIEWS, THERE WERE APPROXIMATELY OVER 30.

20 Q. AND DID MR. RODRIGUEZ CLAIM ANY GANG MONIKER DURING
21 THOSE CONTACTS?

22 A. YES.

23 Q. AND WHAT WAS THE MONIKER THAT HE CLAIMED MOST
24 FREQUENTLY?

25 A. EITHER "CHICO" OR "JAVI".

26 Q. AND DID THE FIELD INTERVIEWS INDICATE WHETHER OR
27 NOT MR. RODRIGUEZ HAD ANY TATOOS THAT WERE CONNECTED WITH
28 SIDRO GANG MEMBERSHIP?

1 A. YES, HE DID.

2 Q. HOW MANY TATOOS DID HE HAVE?

3 A. HE HAD THREE SPECIFIC TATOOS, BUT IN FOUR
4 LOCATIONS.

5 Q. WHAT ARE THOSE TATTOOS, IF YOU KNOW?

6 * A. HE HAD THREE DOTS ON HIS LEFT HAND, HE HAS "SIDRO"
7 ON THE BACK OF HIS NECK, HE HAS THE NUMBERS 1925 BOTH ON HIS
8 RIGHT ARM AND ON HIS STOMACH AREA.

9 Q. AND IN ADDITION TO OBSERVING THE DOCUMENTATION IN
10 CAL/GANGS, DID YOU ALSO HAVE AN OPPORTUNITY TO VIEW THOSE
11 TATOOS DURING THE PRELIMINARY EXAMINATION IN THIS MATTER?

12 A. YES, I DID.

13 Q. AND DO THEY STILL APPEAR ON THE LOCATIONS THAT
14 YOU'VE JUST DESCRIBED?

15 A. YES, THEY DO.

16 Q. IN ADDITION TO IDENTIFYING HIMSELF BY MONIKER AND
17 HAVING TATOOS, DID MR. RODRIGUEZ EVER ADMIT TO OFFICERS THAT
18 HE WAS A SIDRO GANG MEMBER?

19 A. YES, HE HAS.

20 Q. AND APPROXIMATELY HOW MANY OCCASIONS HAS THAT
21 OCCURRED?

22 A. I WOULD HAVE TO GO BACK TO MY NOTES.

23 Q. IF THAT WOULD HELP REFRESH YOUR RECOLLECTION.

24 * A. THANK YOU. APPROXIMATELY 23.

25 Q. IN ADDITION, WAS HE ROUTINELY CONTACTED IN AREAS
26 KNOWN FOR SIDRO GANG ACTIVITY?

27 A. YES, HE WAS.

28 Q. WAS HE EVER CONTACTED IN THE COMPANY OF OTHER

confronta-
tion iss.?

1 DOCUMENTED SIDRO GANG MEMBERS?

2 A. YES, HE WAS.

3 Q. HOW SPECIFICALLY DID THAT OCCUR IN FIELD INTERVIEW
4 CONTACTS?

5 A. AGAIN, I HAVE TO --

6 Q. IF IT WOULD HELP REFRESH YOUR RECOLLECTION.

7 ~~A.~~ A. OKAY. APPROXIMATELY 5.

8 Q. NOW, WOULD YOU CONSIDER THIS DOCUMENTATION TO BE
9 SIGNIFICANTLY OVER WHAT IS REQUIRED FOR DOCUMENTED -- I'M
10 SORRY -- FOR DEPARTMENT OF JUSTICE?

11 A. YES IT IS.

*clearly objectg.
2. ben. of Javier.*

12 MR. LEAHY: YOUR HONOR, I'LL OBJECT ON RELEVANCE.
13 I DON'T THINK HE'S QUALIFIED TO GIVE OPINION.

14 THE COURT: OVERRULED. YOU CAN CROSS-EXAMINE ON
15 IT.

16 BY MS. ROACH:

17 Q. NOW, WITH REGARD TO MR. LEON, DOES HE ALSO HAVE
18 PRIOR CONTACTS SIMILAR TO THOSE OF MR. RODRIGUEZ?

19 MR. LEAHY: OBJECT AS TO VAGUE, YOUR HONOR.

20 THE COURT: SUSTAINED. REPHRASE.

21 BY MS. ROACH:

22 Q. HOW MANY CONTACTS WITH POLICE HAVE BEEN DOCUMENTED
23 IN CAL/GANGS FOR LEON?

24 A. I HAVE TO REFRESH MY MEMORY.

25 Q. IF IT WOULD HELP ASSIST YOU.

26 A. APPROXIMATELY 12.

27 Q. AND WHAT ARE THE DATE RANGES FOR THOSE 12
28 OCCASIONS?

1 A. FROM JUNE OF 1999, TO THE RECENT ONE IN 2003.

2 Q. THAT'S FOR APRIL OF 2003?

3 A. YES.

4 Q. AND, I APOLOGIZE, CAN YOU ALSO GIVE US THE DATE
5 RANGE FOR DEFENDANT RODRIGUEZ'S CONTACTS?

6 A. YES. REFRESHING MY MEMORY. THAT GOES BACK FROM
7 OCTOBER OF 1990, TO SEPTEMBER OF 2002.

8 Q. AND WOULD HIS MOST RECENT CONTACT ACTUALLY BE
9 DEFINED AS HIS ARREST IN THIS CASE WITH DEFENDANT LEON?

10 A. YES.

11 Q. NOW, WITH REGARD TO THE 12 OCCASIONS WHEN MR. LEON
12 WAS CONTACTED, DID HE HAVE ANY MONIKER THAT HE PROVIDED TO
13 POLICE TO INDICATE GANG AFFILIATION?

14 A. YES, HE HAS.

15 Q. WHAT WAS THAT?

16 A. HE GAVE ONE AS "SIDRO MALOS".

17 Q. AND WAS THAT?

18 MR. LEAHY: YOUR HONOR, COULD I HAVE THAT REPEATED?

19 THE WITNESS: SIDRO MALOS.

20 BY MS. ROACH:

21 Q. IN ADDITION, HAS HE ALSO GIVEN THE MONIKER
22 "TREMENDO" ON PRIOR OCCASIONS?

23 A. YES, HE HAS.

24 Q. AND DO THE FIELD INTERVIEWS INDICATE WHETHER OR NOT
25 MR. LEON HAS ANY TATTOOS THAT ARE ASSOCIATED WITH GANG
26 AFFILIATION?

27 A. YES, HE DOES.

28 Q. WHAT IS THAT?

1 A. THE THREE DOTS ON HIS WRIST.

2 Q. WHAT DO THOSE THREE DOTS REPRESENT?

3 * A. "MY CRAZY LIFE."

4 Q. AND IS THAT SOMETHING THAT YOU AS A GANG
5 INVESTIGATOR AND AS A PATROL OFFICER SEE FREQUENTLY IN THE
6 WEB OF THE HANDS ON DOCUMENTED GANG MEMBERS?

7 A. YES.

8 Q. AND ON THE OCCASIONS THAT MR. LEON WAS FIELD
9 INTERVIEWED BY POLICE, HOW MANY OF THE TIMES DID HE CLAIM
10 SIDRO GANG MEMBERSHIP?

11 A. REFRESHING MY MEMORY. AT LEAST 2.

12 Q. AND ON OTHER OCCASIONS, DID HE TELL POLICE THAT HE
13 BACKED SIDRO, OR THAT HE WOULD GO DOWN WITH SOMEBODY FROM
14 SIDRO IN ORDER TO SHOW HIS AFFILIATION WITH THAT GANG?

15 A. YES, HE HAS.

16 Q. IS THAT IN ADDITION TO TIMES THAT YOU'VE
17 DISCOVERED?

18 MR. LEAHY: YOUR HONOR, I'M GOING TO OBJECT ON
19 FOUNDATIONAL GROUNDS.

20 THE COURT: OKAY. LAY THE FOUNDATION.
21 BY MS. ROACH:

22 Q. INVESTIGATOR MARTINEZ, IN YOUR REVIEW OF
23 INFORMATION IN THIS CASE, DID YOU GO DOWN TO THE SAN DIEGO
24 POLICE DEPARTMENT AND COLLECT ORIGINAL FIELD INTERVIEW SLIPS
25 REGARDING DEFENDANT LEON?

26 * A. YES, I DID.

27 Q. AND DID YOU READ THROUGH EACH OF THOSE FIELD
28 INTERVIEW SLIPS INDIVIDUALLY?

1 A. YES, I DID.

2 Q. AND DID THE FIELD INTERVIEW SLIPS CONTAIN
3 INFORMATION SUCH AS THE TYPE THAT YOU'VE DESCRIBED WHICH
4 SUPPORTED THE ENTRY OF THESE DEFENDANTS INTO THE CAL/GANG
5 SYSTEM?

6 A. YES, IT DID.

7 Q. AND IS ONE OF THE CRITERIA WHICH YOU'RE REQUIRED TO
8 ESTABLISH THAT THAT INDIVIDUAL ADMITTED ASSOCIATION OR
9 MEMBERSHIP?

10 A. YES, IT IS.

11 Q. AND WAS THAT RELEVANT TO YOUR INQUIRY AS AN EXPERT
12 WITNESS?

13 A. YES.

14 * Q. IS IT SOMETHING THAT YOU RELY ON FOR YOUR OPINION
15 THAT HE IS A DOCUMENTED GANG MEMBER?

16 A. YES, IT IS.

17 Q. AND WERE THERE OCCASIONS WHEN HE WOULD, RATHER THAN
18 SAY HE WAS A MEMBER OF SIDRO, SIMPLY INDICATE THAT HE EITHER
19 BACKED SIDRO OR THAT HE WAS STANDING BY HIS HOMEBOY?

20 A. YES, HE DID.

21 Q. WERE THERE ALSO TIMES WHEN HE WAS CONTACTED IN THE
22 COMPANY OF OTHER DOCUMENTED SIDRO GANG MEMBERS?

23 A. YES, HE WAS.

24 Q. AND APPROXIMATELY, HOW MANY TIMES DID THAT OCCUR?

25 * A. REFRESHING MY MEMORY. AT LEAST 4.

26 Q. AND ONCE AGAIN THE MOST RECENT OF THOSE CONTACTS
27 WAS WITH SABAS ALDANA IN APRIL?

28 A. YES.

1 Q. AND THEN AGAIN WITH DEFENDANT RODRIGUEZ IN THE
2 CURRENT INCIDENT?

3 A. CORRECT.

4 Q. WITH REGARD TO THE CRIMES OF THEFT, BURGLARY,
5 ROBBERY, VEHICLE THEFT, HOW DO CRIMES LIKE THAT BENEFIT A
6 GANG?

7 * A. EITHER BY THE ITEMS THAT ARE TAKEN -- EITHER THE
8 ITEMS CAN BE USED SUCH AS A CREDIT CARD OR A CHECKBOOK OR
9 SOME TYPE OF ITEM THAT WAS TAKEN FROM THE CAR -- THEY CAN
10 EITHER SELL IT OR GET MONEY FOR IT, OR WITH THE SHORT TIME
11 PERIOD UNTIL THE CREDIT CARDS ARE STOPPED OR CANCELED, THEY
12 CAN USE THOSE TYPE OF ITEMS TO BENEFIT THEIR GANG, OR GETTING
13 ITEMS OF PURCHASE FOR THEMSELVES.

14 Q. HOW DOES THE USE OF A FIREARM BENEFIT A GANG?

15 A. WELL, THE USE OF FIREARMS BENEFITS GANGS. IF A
16 GANG MEMBER HAS A FIREARM ON HIM, ONE, IT'S USED TO EITHER
17 PROTECT HIMSELF OR HE'S USING THE FIREARM TO BE USED IN A
18 CRIME. ALSO, THE FIREARM IS THERE TO BE SHOWN JUST FOR
19 INTIMIDATION FACTOR.

20 Q. AND IF THAT FIREARM IS LOADED, WOULD THAT BE
21 SOMETHING THAT WOULD TYPICALLY INCREASE PERHAPS THE BRAVERY
22 OF THE PERSON THAT'S CARRYING IT?

23 A. YES.

24 Q. AND WITH REGARDS TO WITNESS INTIMIDATION, HOW DOES
25 THAT CRIME BENEFIT GANG MEMBERS?

26 A. WELL, IF YOU DON'T HAVE A VICTIM OR A WITNESS WHO'S
27 GOING TO COME TO COURT TO TESTIFY AGAINST THESE -- AGAINST
28 THE GANG MEMBERS, THEN BASICALLY WHAT THEY'RE TRYING TO DO

Key!
potential for
actual usage?
yes!

Serves purp., howev., bey
the gvn. scope.

1 IS, THAT CASE IS GOING TO GO AWAY BECAUSE YOU CAN'T GO ON
2 WITH THE CASE ANYMORE TO BRING IT TO THE COURT SYSTEM. SO,
3 BASICALLY, THEY DON'T WANT THOSE WITNESSES OR VICTIMS TO
4 IDENTIFY THE SUSPECTS BY JUST INTIMIDATION PURPOSES.

5 Q. AND IN YOUR OPINION, WHEN A GANG MEMBER BENEFITS
6 INDIVIDUALLY FROM A THEFT, IS THAT GENERALLY SOMETHING THAT
7 BENEFITS THE GANG?

8 A. YES.

9 Q. AND WHY IS THAT?

10 ~~X~~ A. WELL, LIKE I SAID BEFORE, THEY CAN USE THOSE ITEMS
11 OR ITEM TAKEN FROM EITHER THE VEHICLE OR A RESIDENCE OR SAY A
12 COMMERCIAL BUILDING IN ORDER TO PROVIDE MORE FOR THEIR GANG.

13 Q. AND WITH REGARD TO WITNESS INTIMIDATION,
14 SPECIFICALLY WITH THE USE OF FIREARMS, HOW DOES THAT BENEFIT
15 MORE THAN JUST THE INDIVIDUAL GANG MEMBER? HOW DOES THAT
16 BENEFIT THE GANG?

17 A. WELL, IT BENEFITS THE GANG BECAUSE IT SHOWS THAT
18 THE GANG IS VERY STRONG. IT SHOWS THAT, BASICALLY, YOU'RE
19 NOT GOING TO MESS WITH US EITHER FROM THE COMMUNITY OR EITHER
20 FROM ANOTHER RIVAL GANG.

21 Q. IN YOUR EXPERIENCE IN INVESTIGATING VIOLENT CRIMES
22 IN THE SOUTHBAY AREA, IS THIS SOMETHING THAT WORKS?

23 A. YES, IT DOES.

24 Q. AND HOW COMMON IS IT FOR YOU TO FIND THAT THERE ARE
25 WITNESSES OR VICTIMS WHO DO NOT WANT TO COME FORWARD IN
26 CRIMES SIMPLY BY VIRTUE OF THE FACT THAT A GANG MEMBER MAY BE
27 INVOLVED?

28 A. JUST BY IT BEING A GANG MEMBER BEING INVOLVED OR

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perps. are
memb. or no

Agg. the wits.
the inst. case wr.
privy NOT to the
particulars.

1 IT'S JUST SIMPLY A GANG CASE, I MEAN, IT'S HARD TO GET
2 WITNESSES TO COME FORWARD.

3 Q. AND IS IT FAIR TO SAY THAT IN THIS PAST YEAR YOU
4 YOURSELF HAVE DONE A NUMBER OF RELOCATIONS OF WITNESSES
5 PRECISELY BECAUSE OF THOSE REASONS?

6 MR. LEAHY: I'M GOING TO OBJECT ON RELEVANCE
7 GROUNDS.

8 THE COURT: OVERRULED.

Und. 2 Cires.!??

9 THE WITNESS: YES, I HAVE. I'VE DONE NUMEROUS.

10 BY MS. ROACH:

11 Q. NOW, YOU'RE FAMILIAR WITH THE FACTS OF THIS CASE,
12 CORRECT?

13 A. YES, I AM.

14 ~~X~~ Q. AND BASED ON YOUR KNOWLEDGE OF THIS CASE, THE FACT
15 THAT THERE IS A VEHICLE THEFT WHERE A CREDIT CARD
16 IDENTIFICATION AND A NUMBER OF OTHER SMALL ITEMS WERE TAKEN,
17 IS IT YOUR OPINION THAT THAT THEFT WAS COMMITTED FOR THE
18 BENEFIT OF DOCUMENTED GANG MEMBERS FOR THE BENEFIT OF THE
19 GANG?

Spoils too insub.
to supp. the
proffered theory

20 ~~X~~ A. YES, IT WAS. ~~NOT TRUE~~

21 Q. AND WITH REGARD TO THE FIRING OF THE WEAPON AFTER
22 WITNESSES INDICATED THAT THEY CALLED THE POLICE, IS IT YOUR
23 OPINION THAT THAT IS DONE FOR THE BENEFIT OF THE GANG BY
24 INDIVIDUAL GANG MEMBERS?

Wits. of the NLI
individ. ben.?

25 A. YES, IT IS.

26 Q. AND WITH REGARD TO POSSESSION OF FIREARMS, IS IT
27 YOUR OPINION THAT THAT, IN FACT, BENEFITS THE CRIMINAL STREET
28 GANG?

1 A. YES, IT DOES.

2 MS. ROACH: YOUR HONOR, EXCEPT -- OR WITH REGARD TO
3 THE ONE FINAL ISSUE, WE'RE DONE.

4 THE COURT: ALL RIGHT. WE'RE AT OUR LUNCH HOUR,
5 LADIES AND GENTLEMEN. AGAIN, LADIES AND GENTLEMEN, I'LL
6 ADMONISH YOU IT IS YOUR DUTY NOT TO CONVERSE AMONGST
7 YOURSELVES OR WITH ANYONE ELSE ON ANY SUBJECT CONNECT WITH
8 THE TRIAL OR FORM OR EXPRESS ANY OPINION UNTIL THE CASE IS
9 FINALLY SUBMITTED TO YOU. SO WE WILL RESUME PROMPTLY AT
10 1:30. HAVE A GOOD LUNCH.

11 (AT 11:53 A.M. THE JURY EXITED THE COURTROOM

12 AND THE FOLLOWING PROCEEDINGS WERE HAD:)

13 THE COURT: ALL RIGHT. THE RECORD WILL REFLECT THE
14 JURY HAS LEFT THE ROOM. COUNSEL ARE PRESENT, DEFENDANTS ARE
15 PRESENT. IN OUR SHORT RECESS OUTSIDE THE PRESENCE OF THE
16 JURY, WE DISCUSSED THE ONE ISSUE THAT THE PEOPLE WANTED TO
17 MAKE PHOTOGRAPHS OF THE TATTOOS RATHER THAN HAVE THEM SHOW
18 THE TATTOOS BY REMOVING THEIR CLOTHING. AND SO TO FACILITATE
19 THAT, CAN WE TAKE THOSE IN THIS ROOM, OR IN THE BACK.

20 THE BAILIFF: IN THE BACK.

21 MS. ROACH: OKAY. WE'LL BE RIGHT BACK WITH A
22 POLAROID.

23 THE COURT: BECAUSE THEY NEED TO TAKE THOSE PHOTOS
24 AT THIS TIME SO THAT THOSE CAN BE USED IN THE TRIAL. AND
25 THEN, COUNSEL, ALSO NEEDS TO SPEAK WITH THEM IN THE BACK.

26 MS. ROACH: AND, YOUR HONOR, IF I COULD JUST --
27 WELL, MAYBE I CAN TALK TO COUNSEL, THAT'S FINE. I JUST WANT
28 TO GET A TIME ESTIMATE FOR BOTH SO I KNOW WHEN TO BRING IN

1 CLOSING EXHIBITS.

2 THE COURT: OKAY. THANK YOU. WE'RE IN RECESS.

3 MR. LEAHY: YOUR HONOR, I'M GOING TO MAKE A REQUEST
4 TO SEE THE FI'S REGARDING MR. LEON.

MS. ROACH: THOSE HAVE ALL BEEN PROVIDED IN
6 DISCOVERY.

7 MR. LEAHY: OKAY. THANK YOU.

8 MS. ROACH: THANK YOU.

9 (AT 11:56 A.M. THE NOON RECESS WAS TAKEN UNTIL
10 1:34 P.M. OF THE SAME DAY.)

11

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1 A. THE SUV, IN THE BOTTOM.

2 Q. OKAY. WHERE YOU KEEP THE SPARE TIRE?

3 A. YES.

4 Q. AND YOU SHOT IT IN THE AIR?

5 A. YES.

6 Q. WELL, WHY DID YOU DO THAT?

7 A. TO THIS TIME I DON'T RECOLLECT WHAT THE REASON
8 BEHIND THAT, WHY I SHOT IT. I MEAN, I WOULD SAY OUT OF
9 STUPIDITY, BUT AT THE SAME TIME, I KNOW I WAS TRYING TO SHOW
10 OFF, YOU KNOW, JUST SOMETHING STUPID THAT I HAD DONE, YOU
11 KNOW, JUST TO FEEL THE RUSH OF IT, I GUESS. I DON'T KNOW. I
12 CAN'T REALLY --

13 Q. NOW, DID YOU BECOME AWARE AT SOME POINT IN TIME IF
14 THERE WERE PEOPLE THERE, THERE WAS SOMEBODY IN THE AREA?

15 A. YES.

16 Q. OKAY. DID YOU -- DID YOU TALK TO THAT PERSON?

17 A. NO.

18 Q. YOU DIDN'T SAY ANYTHING TO THEM?

19 A. NO.

20 Q. OKAY. DID YOU HEAR THEM TALK?

21 ~~A.~~ A. WELL, NOT ACTUALLY TALK. I HEARD SOMEBODY
22 SCREAMING SOMETHING OR YELLING SOMETHING. THAT'S WHEN I
23 NOTICED SOMEONE WAS AGAINST THERE OR AROUND THERE BECAUSE I
24 DIDN'T REALLY SEE NOBODY, BUT I HEARD SOMEBODY YELLING
25 THINGS. AND THAT'S WHEN I TOLD MY PARTNER, YOU KNOW, "LET'S
26 GO."

27 Q. OKAY. SO YOU DIDN'T REALLY SEE ANYBODY?

28 A. NO.

1 Q. BUT YOU DID HEAR SOMEBODY YELL OUT SOMETHING?

2 A. YEAH.

3 Q. OKAY. DID YOU UNDERSTAND WHAT THEY YELLED OUT?

4 A. NO.

5 Q. AND ONCE YOU BECAME AWARE THAT THERE WAS SOMEBODY
6 THERE, YOU TOLD YOUR FRIEND, "LET'S LEAVE," OR, "LET'S GET
7 OUT OF HERE"?

8 A. YES.

9 Q. COULD YOU TELL WHERE HE WAS AT THE TIME?

10 A. NO, NOT REALLY, NO.

11 Q. OKAY. NOW, I TAKE IT YOU WERE DRIVING AT THAT
12 TIME, CORRECT?

13 A. YES.

14 Q. OKAY. SO YOU SAID, "LETS GO." YOU GOT IN THE CAR
15 AND STARTED DRIVING AWAY?

16 A. YES.

17 Q. YOU DROVE OUT THE DRIVEWAY OF THE PARKING LOT? IS
18 THAT A YES?

19 A. YES. SORRY.

20 Q. AND DID YOU BECOME AWARE OF THE POLICE THAT WERE IN
21 YOUR MIRROR? DID YOU SEE THE POLICE COMING AFTER YOU?

22 ~~A.~~ NO, NOT UNTIL THE LIGHTS WENT ON.

23 Q. YOU SAW THE LIGHTS?

24 A. YEAH.

25 Q. THE RED LIGHTS?

26 A. YEAH.

27 Q. OKAY. AND WHEN YOU SAW THE RED LIGHTS, WHAT DID
28 YOU DO?

1 A. I PULLED OVER.

2 Q. NOW, AT THAT POINT IN TIME, WHAT WAS YOUR STATE OF
3 MIND? HOW WERE YOU THINKING AT THAT POINT IN TIME?

4 MS. ROACH: OBJECTION. RELEVANCE AS TO STATE OF
5 MIND AT THAT POINT IN TIME.

6 THE COURT: SUSTAINED.

7 BY MR. SANCHEZ:

8 Q. DID THE POLICE OFFICER COME TO GET YOU OUT OF THE
9 CAR?

10 ~~A.~~ A. I DON'T REALLY REMEMBER THAT.

11 Q. YOU DON'T REMEMBER?

12 A. ~~NO.~~

13 Q. YOU REMEMBER BEING ARRESTED AT THAT POINT IN TIME?

14 A. I REMEMBER BEING TAKEN, YES. WELL, WHEN I -- I
15 GUESS SOMEBODY SAID, YOU KNOW, "EXIT THE VEHICLE," AND I
16 EXITED, PUT THE HANDS UP. I REMEMBER JUST BEING KNOCKED TO
17 THE GROUND.

18 Q. YOU REMEMBER BEING KNOCKED DOWN TO THE GROUND?

19 A. YES. WELL, SOMEBODY TASED ME FROM BEHIND.

20 Q. THEY DID WHAT?

21 ~~A.~~ A. TASED.

22 Q. TASED YOU?

23 A. YES.

24 Q. WITH A TASER GUN?

25 A. TASER GUN, YES.

26 Q. IN THE BACK?

27 A. IN MY LEGS.

28 Q. IN YOUR LEGS?

1 A. YES, TWICE.

2 Q. DO YOU KNOW WHY THEY DID THAT?

3 MS. ROACH: OBJECTION. CALLS FOR SPECULATION.

4 THE COURT: SUSTAINED.

5 MR. SANCHEZ:

6 Q. AND IT WAS AFTER THAT THAT YOU WERE THEN
7 HANDCUFFED?

8 A. YES.

9 Q. AND TAKEN INTO CUSTODY?

10 A. YES.

11 MR. SANCHEZ: THAT'S ALL THE QUESTIONS I HAVE, YOUR
12 HONOR.

13 THE COURT: ALL RIGHT. BEFORE WE HAVE
14 CROSS-EXAMINATION, LADIES AND GENTLEMEN, WE HAVE ONE OF OUR
15 NEW JUDGES VISITING US, AND THE JUDGES ARE GOING TO BE
16 MEETING WITH THE NEW JUDGE. AND SO, WE'LL BE CONCLUDING
17 EARLY TODAY. WE WILL RESUME TOMORROW MORNING AT 9. WE ARE
18 MAKING SUBSTANTIAL PROGRESS.

19 AGAIN, I'LL ADMONISH YOU, IT IS YOUR DUTY NOT TO
20 CONVERSE AMONGST YOURSELVES OR WITH ANYONE ELSE ON ANY
21 SUBJECT CONNECTED WITH THE TRIAL, OR TO FORM OR EXPRESS ANY
22 OPINION UNTIL THE CASE IS FINALLY SUBMITTED TO YOU. SEE YOU
23 AT 9 A.M. TOMORROW.

24 (AT 4:00 P.M. THE JURY WAS EXCUSED AND THE
25 FOLLOWING PROCEEDINGS WERE HAD:)

26 THE COURT: ALL RIGHT. THE RECORD WILL REFLECT THE JURY
27 HAS LEFT THE ROOM. COUNSEL IS PRESENT, DEFENDANT IS PRESENT.
28 WHY DON'T WE PLAN ON GOING OVER FINALIZING THE INSTRUCTIONS

1 440-500

2 TOMORROW EITHER RIGHT BEFORE OR AFTER THE NOON HOUR. AND YOU
3 SAID YOU HAD SOMETHING ELSE, MR. LEAHY?

4 MR. LEAHY: YOUR HONOR, I JUST WANT TO ASK THE
5 COURT TO TAKE A LOOK AT CALJIC 4.21.1, 4.21.2, AND 4.22.

6 THE COURT: LET ME HAVE THOSE NUMBERS AGAIN.

7 MR. LEAHY: 4.21.1 -- THESE ARE THE VOLUNTARY
8 INTOXICATION INSTRUCTIONS -- 4.21.2, AND 4.22.

9 THE COURT: OKAY. I'LL TAKE A LOOK AT THOSE.

10 MS. ROACH: AND, YOUR HONOR, IF THIS IS THE ONLY
11 WITNESS, I WOULD ANTICIPATE BEING READY FOR CLOSING ARGUMENT
12 PROBABLY BY 10 O'CLOCK TOMORROW. SO I DON'T KNOW IF THE
13 COURT WANTS TO MEET FOR JURY INSTRUCTIONS EARLIER?

14 THE COURT: WHY DON'T WE MEET FOR INSTRUCTIONS AT
15 8:30 TOMORROW MORNING.

16 MS. ROACH: 8:30.

17 THE COURT: OKAY. I'LL SEE YOU AT 8:30 TOMORROW
18 MORNING.

19 MR. LEAHY: THANK YOU.

20 (AT 4:00 P.M. AN ADJOURNMENT WAS TAKEN UNTIL
21 WEDNESDAY, AUGUST 13, AT 9:00.)

22 - - -

23 (THIS PAGE DESIGNATED 440-500 BLOCK-NUMBERING
24 PURPOSES ONLY. PROCEEDINGS CONTINUE ON PAGE 501.
25 NOTHING OMITTED.)
26
27
28

1 WELL, IN THAT CASE, WE'LL TAKE OUR AFTERNOON RECESS. AGAIN,
2 I WILL ADMONISH YOU, IT IS YOUR DUTY NOT TO CONVERSE AMONGST
3 YOURSELVES OR WITH ANYONE ELSE ON ANY SUBJECT CONNECTED WITH
4 THIS TRIAL, OR FORM OR EXPRESS ANY OPINION UNTIL THE CASE IS
5 FINALLY SUBMITTED TO YOU. 15 MINUTE RECESS.

6 (RECESS.)

7 THE COURT: ALL RIGHT. WELCOME BACK, LADIES AND
8 GENTLEMEN. AND MR. SANCHEZ, YOU MAY CALL YOUR FIRST WITNESS.

9 MR. SANCHEZ: YOUR HONOR, WE WOULD LIKE -- DEFENSE
10 WOULD CALL GLORIA RODRIGUEZ.

11 THE COURT: SHE IS BEING ASSISTED BY THE COURT
12 CERTIFIED INTERPRETER.

13

14 GLORIA A. VAZQUEZ

15 THE DEFENDANT'S WITNESS, HAVING BEEN SWORN, TESTIFIED THROUGH
16 A SPANISH-LANGUAGE INTERPRETER AS FOLLOWS:

17

18 THE CLERK: PLEASE HAVE A SEAT ON THE WITNESS
19 STAND. CAN YOU PLEASE STATE YOUR FULL NAME AND SPELL YOUR
20 LAST NAME FOR THE RECORD.

21 THE WITNESS: GLORIA ALICIA VAZQUEZ, CAPITAL
22 V-A-Z-Q-U-E-Z.

23 THE COURT: YOU MAY PROCEED.

24 DIRECT EXAMINATION

25 BY MR. SANCHEZ:

26 Q. GOOD AFTERNOON, MS. VAZQUEZ. DO YOU KNOW THIS
27 GENTLEMAN SEATED IN FRONT OF ME?

28 A. YES.

1 Q. ARE YOU MARRIED TO HIM?

2 A. YES.

3 Q. DO YOU HAVE CHILDREN WITH HIM?

4 A. YES.

5 Q. HOW MANY CHILDREN DO YOU HAVE WITH HIM?

6 A. TWO CHILDREN.

7 Q. HOW OLD ARE THEY?

8 MS. ROACH: OBJECTION. RELEVANCE.

9 THE COURT: OVERRULED.

10 THE WITNESS: MY LITTLE BOY IS 3 YEARS OLD AND MY

11 OTHER LITTLE BOY IS 5 MONTHS.

12 BY MR. SANCHEZ:

13 Q. NOW, YOU LIVE IN WHAT AREA OF TOWN?

14 ~~A.~~ A. CITY HEIGHTS.

15 Q. CITY HEIGHTS. AND HOW LONG HAVE YOU LIVED AT CITY
16 HEIGHTS?

17 ~~A.~~ A. SINCE 1999.

18 Q. HAVE YOU AND MR. RODRIGUEZ LIVED AT CITY HEIGHTS
19 TOGETHER SINCE 1999?

20 A. YES.

21 Q. AND WHY DID YOU -- IS THERE ANY PARTICULAR REASON
22 YOU MOVED TO CITY HEIGHTS?

23 ~~A.~~ A. YES, TO BE FAR AWAY FROM SAN YSIDRO.

24 Q. OKAY. NOW, COULD YOU TELL US WHERE MR. RODRIGUEZ
25 IS EMPLOYED?

26 A. HE USED TO WORK BUILDING THE STADIUM THAT IS BEING
27 BUILT DOWNTOWN.

28 Q. BUT WHAT DOES HE DO IN THAT JOB?

1 A. CONCRETE WORK.

2 Q. AND APPROXIMATELY, DOES HE GET OFF OF WORK THE SAME
3 TIME EVERYDAY?

4 A. YES.

5 Q. AND WHAT TIME WOULD THAT BE?

6 A. HE USED TO GET OUT OF WORK AT 3:30 AND HE'D BE HOME
7 BY 4.

8 Q. THAT'S FROM MONDAY THROUGH FRIDAY?

9 A. YES.

10 Q. AND GENERALLY SPEAKING, IS HE USUALLY HOME IN THE
11 EVENINGS?

12 A. YES.

13 Q. AND ON WEEKENDS, DO YOU AND HIM AND THE CHILDREN
14 GENERALLY DO THINGS TOGETHER?

15 A. YES.

16 Q. WHAT KIND OF THINGS DO YOU DO?

17 ~~A.~~ WE'D GO ON OUTINGS AND TO VISIT THE CHILDREN'S
18 GRANDPARENTS.

19 Q. NOW, ARE YOU AWARE IF MR. RODRIGUEZ STILL HAS A
20 PROBLEM WITH DRUGS?

21 A. HE WAS GOING TO A CLASS ABOUT DRUGS.

22 Q. GOING TO A CLASS FOR DRUGS?

23 ~~A.~~ YES.

24 Q. DO YOU KNOW HOW OFTEN HE WOULD GO?

25 A. HE WOULD GO ON THURSDAYS AND FRIDAYS.

26 Q. DO YOU KNOW WHERE THE CLASS WAS?

27 A. NO, JUST THAT IT WAS IN NATIONAL CITY. HE WOULD
28 COME OVER, I DON'T KNOW EXACTLY, BUT IT WAS IN NATIONAL CITY.

1 Q. NOW, WHERE -- COULD YOU TELL US WHERE YOUR
2 MOTHER-IN-LAW RESIDES? YOU DON'T HAVE TO GIVE ME ADDRESS,
3 BUT JUST GENERAL?

4 A. SHE LIVES OVER THERE AROUND SAN YSIDRO.

5 Q. OKAY. AND DID YOU AND YOUR HUSBAND GO TO VISIT HER
6 FROM TIME TO TIME?

7 A. YES.

8 Q. NOW, DO YOU RECALL MOTHER'S DAY OF THIS YEAR?

9 A. YES.

10 Q. DID YOU GO VISIT HER ON MOTHER'S DAY THIS YEAR?

11 ~~X~~ A. YES.

12 Q. AND WHILE YOU WERE AT HER HOME VISITING HER, DID
13 MR. RODRIGUEZ RECEIVE A TELEPHONE CALL FROM MR. LEON?

14 MS. ROACH: OBJECTION. LEADING. CALLS FOR
15 SPECULATION OF PERSONAL KNOWLEDGE.

16 THE COURT: SUSTAINED.

17 BY MR. SANCHEZ:

18 Q. DO YOU KNOW WHETHER HE RECEIVED A CALL FROM
19 MR. LEON?

20 MS. ROACH: OBJECTION. CALLS FOR SPECULATION. NO
21 FOUNDATION.

22 MR. SANCHEZ: I'M NOT ASKING HER TO SPECULATE. I'M
23 ASKING HER IF SHE KNOWS.

24 THE COURT: REPHRASE.

25 BY MR. SANCHEZ:

26 Q. LET ME PUT IT THIS WAY. DO YOU KNOW IF
27 MR. RODRIGUEZ RECEIVED A TELEPHONE CALL?

28 A. NO, HE JUST RECEIVED A PHONE CALL, BUT I DON'T KNOW

1 FROM WHOM.

2 Q. AND DID HE -- DID HE AFTER THAT PHONE CALL, DID HE
3 LEAVE THE HOUSE?

4 ~~X~~ A. YES.

5 Q. AND DO YOU KNOW APPROXIMATELY WHAT TIME THAT WAS?

6 ~~A~~ A. AROUND 10:15 IN THE EVENING.

7 MR. SANCHEZ: THANK YOU. I HAVE NOTHING -- NO

8 FURTHER QUESTIONS, YOUR HONOR.

9 THE COURT: THANK YOU. CROSS-EXAM.

10 MR. LEAHY: NO, I HAVE NO QUESTIONS, YOUR HONOR.

11 THANK YOU.

12 THE COURT: OKAY. MS. ROACH.

13 CROSS-EXAMINATION

14 BY MS. ROACH:

15 Q. BACK ON MOTHER'S DAY, DID YOU AND YOUR HUSBAND GO
16 TO YOUR MOTHER-IN-LAW'S HOUSE TOGETHER?

17 A. NO.

18 Q. DID YOU GO WITH HIM AT ALL?

19 MR. SANCHEZ: THAT'S AMBIGUOUS. THEY JUST ASKED IF
20 THEY WENT TOGETHER. I DON'T UNDERSTAND THE QUESTION.

21 THE COURT: OVERRULED. YOU MAY ANSWER.

22 THE WITNESS: I DIDN'T UNDERSTAND THE QUESTION.

23 BY MS. ROACH:

24 Q. I'M SORRY. DID YOU GO TO YOUR MOTHER-IN-LAW'S
25 HOUSE?

26 A. YES.

27 Q. OKAY. HOW DID YOU GET THERE?

28 A. I WAS GOING TO TAKE MY SISTER -- MY SISTER TOOK ME.

1 Q. AND DID YOU GO WITH YOUR CHILDREN?

2 A. YES.

3 Q. YOUR CHILDREN AT THAT TIME WERE A MONTH OLD AND 3;
4 IS THAT CORRECT?

5 A. NO.

6 Q. HOW OLD WERE THEY?

7 A. MY LITTLE BOY WAS ALMOST GOING TO BE 3 YEARS OLD.
8 HE STILL HAD A MONTH TO GO. AND MY OTHER LITTLE BOY -- AND
9 THE BABY WAS THREE MONTHS OLD.

10 Q. AND HOW LONG WAS IT THAT YOU STAYED AT YOUR
11 MOTHER-IN-LAW'S HOUSE ON THAT DAY?

12 A. WHO?

13 Q. YOU.

14 A. ME?

15 Q. YES, YOU.

16 A. I ARRIVED THERE AT AROUND 7, AND I LEFT AT ABOUT 1
17 IN THE MORNING.

18 Q. AND DID YOUR CHILDREN LEAVE WITH YOU AS WELL, OR
19 DID THEY STAY AT THEIR GRANDMOTHERS?

20 A. THEY LEFT WITH ME.

21 Q. WERE YOU WAITING AT THE HOUSE FOR YOUR HUSBAND TO
22 RETURN?

23 A. YES.

24 Q. AND WERE YOU WORRIED ABOUT HIM AT ALL?

25 A. YES.

26 Q. WAS IT UNUSUAL FOR HIM TO GO OUT AT NIGHT?

27 A. YES.

28 Q. NOW, LET ME ASK YOU THIS. HOW LONG HAVE YOU BEEN

1 MARRIED?

2 A. 2 MONTHS.

3 Q. AND HOW LONG HAVE YOU BEEN LIVING TOGETHER?

4 A. SINCE 1999.

5 Q. HAVE YOU LIVED TOGETHER THE ENTIRE TIME SINCE 1999?

6 A. YES.

7 Q. HAVE YOU EVER LIVED IN SAN YSIDRO WITH YOUR

8 HUSBAND?

9 A. NO.

10 Q. DO YOU HAVE ANY IDEA WHY HE WOULD USE AN ADDRESS ON

11 WARDLOW IN SAN YSIDRO DURING POLICE CONTACTS IN 2001?

12 MR. SANCHEZ: OBJECTION. SPECULATION.

13 THE COURT: OVERRULED. YOU MAY ANSWER.

14 THE WITNESS: BECAUSE THAT'S THE ADDRESS FOR HIS

15 PARENTS.

16 BY MS. ROACH:

17 Q. WAS HE STILL LIVING WITH HIS PARENTS OFF AND ON

18 THROUGHOUT THAT TIME?

19 * A. NO.

20 Q. DO YOU KNOW WHETHER OR NOT YOUR HUSBAND WAS JUMPED

21 INTO THE SIDRO GANG AT A YOUNG AGE?

22 A. NO, I DON'T KNOW.

23 Q. DO YOU KNOW WHETHER HE EVER ASSOCIATED WITH SIDRO

24 GANG MEMBERS?

25 A. NO.

26 Q. DO YOU KNO WHETHER ANY OF HIS BROTHERS ARE MEMBERS

27 OF THE SIDRO GANG?

28 A. NO.

1 Q. DO YOU KNOW MR. LEON?

2 A. NO.

3 Q. SO THIS GENTLEMAN SITTING RIGHT OVER HERE ON THE
4 FAR END OF THE TABLE, YOU DON'T KNOW HIM AT ALL?

5 A. YES, BUT I DIDN'T KNOW HIS LAST NAME WAS LEON.

6 Q. AND HOW OFTEN HAVE YOU MET HIM PREVIOUSLY?

7 A. VERY FEW TIMES.

8 Q. AND IN WHAT SETTING WOULD YOU SEE MR. LEON?

9 A. WHEN HE WOULD GO TO THE HOUSE.

10 Q. TO YOUR HOUSE IN NORTH PARK?

11 A. NO, I DIDN'T LIVE IN NORTH PARK. CITY HEIGHTS.

12 Q. TO YOUR HOUSE IN CITY HEIGHTS?

13 A. YES.

14 Q. OKAY. HOW MANY TIMES WOULD YOU SAY?

15 A. ABOUT FIVE TIMES.

16 Q. AND WHEN MR. LEON CAME TO YOUR HOUSE, DID HE COME
17 WITH OTHER PEOPLE?

18 ~~*~~ A. NO.

19 Q. AND DID MR. LEON AND YOUR HUSBAND DO DRUGS IN YOUR
20 HOUSE WHEN THEY WERE TOGETHER?

21 MR. LEAHY: BEYOND THE SCOPE OF DIRECT EXAMINATION.

22 THE COURT: OVERRULED.

23 THE WITNESS: NO.

24 BY MS. ROACH:

25 Q. AND WOULD THEY DISAPPEAR FOR ANY LENGTH OF TIME
26 WHEN HE WOULD COME AND VISIT ON PRIOR OCCASIONS?

27 A. NO.

28 Q. DO YOU KNOW WHETHER OR NOT MR. LEON IS A SIDRO GANG

1 MEMBER?

2 A. I DON'T KNOW ANYTHING ABOUT HIM.

3 Q. DID YOU GROW UP IN SAN YSIDRO?

4 A. NO.

5 Q. AND HAVE YOU EVER LIVED IN SAN YSIDRO?

6 A. NO.

7 Q. NOW, WITH REGARD TO THESE CLASSES THAT YOU SAID
8 YOUR HUSBAND WAS GOING TO, YOU DON'T KNOW WHETHER HE WAS
9 GOING TO CLASSES OR NOT, DO YOU?

10 A. YES, HE WOULD GO TO THE CLASSES.

11 Q. HOW DID YOU KNOW THAT? WOULD YOU SEE HIM?

12 ~~A.~~ A. NO, BECAUSE HE WOULD TAKE A PAPER, AND THEY WOULD
13 SIGN IT AND PUT THE DATE ON IT WHENEVER HE ATTENDED THE
14 CLASS.

15 Q. AND THAT WASN'T RECENTLY, THAT WAS SOME TIME AGO,
16 CORRECT?

17 A. NO.

18 Q. HOW RECENTLY WAS THAT?

19 A. IT WAS IN MARCH -- IN MARCH OR IN APRIL WHEN HE WAS
20 GOING TO CLASSES.

21 Q. HOW LONG DID THE CLASSES LAST?

22 A. NO. I DON'T KNOW.

23 Q. DID YOUR HUSBAND HAVE GUNS IN THE HOUSE?

24 A. NO.

25 ~~Q.~~ Q. WHAT ABOUT AMMUNITION? DID YOU EVER SEE THAT
26 AROUND THE HOUSE?

27 A. NO.

28 Q. WHAT KIND OF CAR DOES YOUR HUSBAND DRIVE?

1 A. AN EXPLORER WAGON.

2 Q. AND IS THAT A CAR THAT YOU ALSO DRIVE?

3 A. NO.

4 Q. HOW IS IT THAT YOUR CHILDREN ARE TRANSPORTED ON
5 THESE FAMILY OUTINGS? DO YOU DRIVE IN THE CAR WITH THEM, OR
6 DOES YOUR HUSBAND DRIVE ALL OF YOU TOGETHER?

7 A. HE'LL DRIVE.

8 Q. SO YOU'RE IN THE CAR FREQUENTLY?

9 A. YES.

10 Q. AND YOU HAVE A LOT OF GEAR FOR THE BABIES?

11 A. YES.

12 Q. SO, CAR SEATS, AND DIAPER BAGS, AND EXTRA CLOTHES,
13 AND STROLLERS?

14 A. YES.

15 Q. AND IS IT FAIR TO SAY THAT ALL OF THAT EQUIPMENT
16 PRETTY MUCH TAKES THE WHOLE CAR FOR STORAGE?

17 MR. LEAHY: SPECULATION AND VAGUE, YOUR HONOR.

18 THE COURT: OVERRULED.

19 THE WITNESS: I DIDN'T UNDERSTAND.

20 BY MS. ROACH:

21 Q. WELL, WHEN YOU'RE LOADING UP THE KIDS IN THE CAR,
22 DO YOU OPEN THE BACK HATCH OF THE TRUCK?

23 A. NO.

24 Q. HAVE YOU EVER OPENED THE BACK OF YOUR HUSBAND'S
25 TRUCK OR EXPLORER?

26 A. YES.

27 Q. HAVE YOU EVER SEEN A GUN BACK THERE?

28 ~~V~~ A. NO.

1 Q. DO YOU KNOW WHERE YOUR HUSBAND STORED HIS GUN?

2 A. I DIDN'T KNOW THAT HE HAD A GUN.

3 Q. DID YOU EVER GO INTO HIS CAR THE NIGHT THAT YOU
4 WENT TO YOUR MOTHER-IN-LAW'S HOUSE?

5 A. NO.

6 Q. SO THERE WAS NOTHING INSIDE OF THE CAR THAT YOU
7 NEEDED, NO CHILD SEAT TO GET OUT FOR YOUR SISTER OR ANYTHING
8 LIKE THAT?

9 A. NO.

10 Q. WHERE DO YOU NORMALLY KEEP YOUR CHILD SEATS?

11 A. AT HOME.

12 Q. YOU DON'T KEEP THEM IN THE CAR?

13 A. BECAUSE SOMETIMES I GO OUT WITH MY SISTER AND I
14 NEED THE SEATS.

15 Q. DO YOU RECOGNIZE PEOPLE'S EXHIBIT 19?

16 A. NO.

17 Q. DO YOU RECOGNIZE THE PHOTOGRAPHS DEPICTED IN
18 PEOPLE'S EXHIBIT 4?

19 A. THE TOP ONES, I DO.

20 Q. AND WHAT ARE THE TOP ONES?

21 A. WELL, THE WAGON.

22 Q. IS THAT YOUR HUSBAND'S CAR?

23 A. IT USED TO BE MY HUSBAND'S CAR.

24 Q. BACK IN MAY, WAS THIS YOUR HUSBAND'S CAR?

25 A. YES.

26 Q. AND YOU NEVER NOTICED ANYTHING UNUSUAL INSIDE OF
27 THE CAR, NO GUNS, NO AMMUNITION, NOTHING LIKE THAT?

28 A. NO.

1 Q. DO YOU KNOW YOUR HUSBAND TO CARRY TOOLS WITH HIM
2 WHEN HE'S DRIVING IN HIS CAR?

3 A. YES.

4 Q. WHAT TYPES OF TOOLS WOULD HE NORMALLY CARRY?

5 ~~X~~ A. WELL, IN THE EVENT THAT HE GETS A FLAT TIRE, YOU
6 KNOW, WHATEVER TOOLS HE NEEDS TO REPAIR THE FLAT TIRE, AND
7 WHATEVER TOOLS HE USES AT WORK FOR HIS JOB.

8 Q. AND DO YOU KNOW WHAT TYPE OF TOOLS HE HAS TO TAKE
9 THE TIRES OFF OF THE CAR?

10 A. NO.

11 Q. YOU NEVER SAW IT?

12 A. YES, BUT I DON'T NO.

13 Q. YOU REMEMBER IF IT WAS BLACK OR SILVER?

14 A. NO.

15 MS. ROACH: I HAVE NOTHING FURTHER.

16 THE COURT: THANK YOU. ANY REDIRECT?

17 MR. SANCHEZ: NO, YOUR HONOR.

18 THE COURT: ANYTHING FURTHER?

19 MR. LEAHY: NO, YOUR HONOR. THANK YOU.

20 THE COURT: OKAY, MA'AM. YOU'RE EXCUSED.

21 MR. SANCHEZ, YOU MAY CALL YOUR NEXT WITNESS.

22 MR. SANCHEZ: THANK YOU, YOUR HONOR. THE DEFENSE
23 WOULD CALL JAVIER RODRIGUEZ.

24

25 JAVIER RODRIGUEZ,

26 HAVING BEEN FIRST DULY ADMINISTERED AN OATH IN ACCORDANCE
27 WITH CODE OF CIVIL PROCEDURE SECTION 2094, WAS EXAMINED AND
28 TESTIFIED AS FOLLOWS:

1 THE CLERK: PLEASE STATE YOUR FULL NAME AND SPELL
2 YOUR LAST NAME FOR THE RECORD.

3 THE WITNESS: JAVIER RODRIGUEZ. RODRIGUEZ IS
4 SPELLED AS R-O-D-R-I-G-U-E-Z.

5 THE COURT: ALL RIGHT. YOU MAY PROCEED, COUNSEL.

6 MR. SANCHEZ: THANK YOU, YOUR HONOR.

7 DIRECT EXAMINATION

8 BY MR. SANCHEZ:

9 Q. MR. RODRIGUEZ, PRIOR TO YOUR ARREST, WHAT PART OF
10 TOWN WERE YOU RESIDING IN?

11 A. CITY HEIGHTS.

12 Q. HOW LONG HAVE YOU RESIDED IN CITY HEIGHTS?

13 A. SINCE I WAS RELEASED FROM INCARCERATION, '99.

14 Q. '99?

15 THE COURT: COULD YOU MOVE THE MICROPHONE UP
16 CLOSER? THANK YOU.

17 BY MR. SANCHEZ:

18 Q. AND WITH WHO DO YOU RESIDE THERE?

19 A. MY WIFE AND TWO KIDS.

20 Q. WERE YOU EMPLOYED AT THE TIME?

21 A. YES, SIR.

22 Q. WHERE WERE YOU EMPLOYED?

23 A. I WAS EMPLOYED -- WELL, I WAS EMPLOYED BY THE UNION
24 LOCAL 500. I'M A FINISHER. THEY EMPLOYED ME WITH A JOB AT
25 SAN DIEGO STADIUM BALLPARK DOWNTOWN.

26 Q. DOWNTOWN?

27 A. YES, SIR.

28 Q. YOU WOULD -- WHAT I BELIEVE WE HEARD THAT YOU

1 GENERALLY WOULD GET OFF WORK ABOUT 3:30 IN THE AFTERNOON?

2 A. YEAH, WHEN THERE WAS NO OVERTIME. BASICALLY, 3:30.

3 Q. OKAY. IF THERE WAS OVERTIME THEN, YOU WOULD WORK?

4 A. OH, YEAH. SOMETIMES YOU HAD TO WAIT TILL THE

5 CONCRETE DRY UP, SO --

6 Q. HOW LONG DID YOU WORK THERE?

7 A. I WORKED THERE ABOUT A YEAR -- AROUND A YEAR.

8 Q. OKAY. AND WAS THAT JUST AT THAT SITE THAT YOU
9 WORKED THERE A YEAR, OR DID YOU WORK AT OTHER SITES BEFORE
10 THAT?

11 A. YEAH, I WORKED AT OTHER SITES. WHAT THE UNION DOES
12 IT PROVIDES YOU WITH JOBS. WHEN ONE JOB IS DONE, THEY GET
13 YOU -- THEY LOOK, YOU KNOW. THEY GET YOU ANOTHER JOB SITE.

14 Q. THEY SEND YOU SOMEWHERE ELSE?

15 A. YEAH, THEY SEND YOU SOMEWHERE ELSE. THEY'RE LIKE
16 OUR AGENT, YOU CAN SAY THAT.

17 Q. WHERE DID YOU WORK BEFORE THAT?

18 A. BEFORE THAT, I WORKED FOR A COMPANY NAMED HANDYMEN
19 IN SANTEE. WE DID BUILDINGS, LIKE, BUSINESS BUILDINGS,
20 FOUNDATIONS AND ALL THAT, WALLS.

21 Q. OKAY. HOW LONG WERE YOU THERE?

22 A. I WAS THERE FOR LIKE THREE MONTHS.

23 Q. IS THAT SORT OF THE WAY IT'S GONE FOR THE LAST FOUR
24 YEARS, YOU'D WORK AT A JOB --

25 A. I WORKED AT DIFFERENT PLACES. WHEN I WAS RELEASED
26 FROM INCARCERATION, I WAS WORKING FOR COSTCO AT THE
27 WAREHOUSE. I STARTED AT THE WAREHOUSE -- I WORKED THERE FOR
28 A PREVIOUS AMOUNT OF TIME. I CAN'T REALLY RECALL HOW MUCH

1 TIME. I WAS -- I WAS EITHER LAID OFF OR LOOKED FOR ANOTHER
2 JOB. I HAD A JOB NO MATTER WHAT.

3 Q. SO YOU -- YOU'VE BEEN EMPLOYED CONTINUOUSLY?

4 A. YEAH, THAT'S NO PROBLEM.

5 Q. NOW, BEFORE YOU MOVED TO CITY HEIGHTS, WHERE WERE
6 YOU RESIDING?

7 A. AT MY PARENT'S HOUSE.

8 Q. AND WHERE IS THAT LOCATION?

9 A. IN SAN YSIDRO.

10 Q. AND DO YOU RECALL HOW OLD YOU WERE WHEN YOU FIRST
11 MOVED TO SAN YSIDRO?

12 A. I STARTED -- I STARTED ELEMENTARY THERE. SO I'D
13 SAY, AROUND 1985.

14 Q. OKAY. SO YOU WERE IN ELEMENTARY SCHOOL?

15 A. YEAH, I WAS GOING -- I STARTED THERE SECOND GRADE.

16 Q. NOW, COULD YOU TELL US HOW LONG YOU'VE KNOWN
17 MR. LEON?

18 A. I KNOW MR. LEON BY HIS OLDER BROTHER. I GREW UP
19 WITH HIS OLDER BROTHER.

20 Q. IN SAN YSIDRO?

21 A. YEAH, IN SAN YSIDRO.

22 Q. SO YOU KNOW OTHER MEMBERS OF HIS FAMILY?

23 A. YEAH, I KNOW ALL OF HIS FAMILY, HIS COUSINS.

24 Q. ABOUT HOW MANY YEARS WOULD YOU SAY?

25 A. 8 YEARS.

26 Q. HOW OLD ARE YOU NOW BY THE WAY?

27 A. I'M 27.

28 Q. NOW, AT SOME POINT IN TIME, DID YOU JOIN THE SIDRO

1 GANG?

2 A. YES, I DID.

3 Q. CAN YOU TELL US ABOUT HOW OLD YOU WERE AT THE
4 TIME.

5 A. I WAS ABOUT 11, 12.

6 Q. WHY DID YOU JOIN THE GANG?

7 A. WELL, I -- AT THAT TIME, IT'S KIND OF HARD TO
8 EXPLAIN. I MEAN, ALL MY SURROUNDINGS -- I GOT MY BROTHERS
9 ARE ALL GANG MEMBERS, THE COMMUNITY WHERE I LIVE. I MEAN,
10 THAT'S ALL I SEE. MY FRIENDS, THEY WERE GANG MEMBERS. I
11 MEAN, IT HAD A BIG INFLUENCE ON ME AT THAT POINT WHEN I WAS
12 YOUNG. I GUESS I WANTED TO BECOME PART OF SOMETHING, YOU
13 KNOW? I FELT LIKE I BELONGED TO SOMETHING, YOU KNOW?

14 Q. YOU HAD SOME BROTHERS IN THE GANG?

15 A. YEAH.

16 Q. HOW MANY BROTHERS DO YOU HAVE?

17 A. I GOT -- I GOT -- I GOT FIVE BROTHERS.

18 Q. WHEN YOU WERE A MEMBER OF THE GANG, DID YOU GET IN
19 TROUBLE FROM TIME TO TIME?

20 A. YEAH. YES.

21 Q. IN 1998, DID YOU SUFFER A CONVICTION FOR BURGLARY?

22 A. YES.

23 Q. AND IN 1997, DID YOU SUFFER A CONVICTION FOR CAR
24 THEFT?

25 A. YES.

26 Q. BECAUSE OF THOSE CASES, DID YOU DO SOME TIME IN
27 CUSTODY?

28 A. YES.

1 Q. AND WHAT YEAR DID YOU GET OUT?

2 A. WHICH ONE?

3 Q. THE LAST ONE?

4 A. THE LAST ONE, I WAS RELEASED AUGUST OF '99.

5 Q. AUGUST OF '99?

6 A. YES.

7 Q. IS THAT WHEN YOU MOVED TO CITY HEIGHTS?

8 A. YES.

9 Q. WAS THAT TO GET AWAY FROM SAN YSIDRO?

10 A. YES.

11 Q. WAS THAT YOUR INTENT AT THAT TIME TO GET OUT OF
12 GANG LIFE?

13 MS. ROACH: OBJECTION. LEADING.

14 THE COURT: SUSTAINED.

15 BY MR. SANCHEZ:

16 Q. WHY WERE YOU TRYING TO GET OUT OF SAN YSIDRO?

17 * A. BECAUSE OF -- I WAS TIRED OF THAT LIFESTYLE. I WAS
18 JUST -- I WANTED TO HAVE MY OWN FAMILY, JUST DO WHAT'S RIGHT,
19 YOU KNOW, JUST --

20 Q. DURING THIS PERIOD OF TIME THEN YOU HAD A -- WERE
21 YOU USING DRUGS?

22 * A. YES.

23 Q. WE HEARD FROM YOUR WIFE THAT YOU WERE GOING TO --
24 YOU WERE ATTENDING A DRUG PROGRAM?

25 A. YES.

26 Q. WHAT PROGRAM WAS THAT?

27 A. IT'S CALLED CRASH.

28 Q. WERE YOU GOING TO THE CLASSES?

Drug Release M.G.

1 A. YES.

2 Q. BUT YOU WERE STILL USING DRUGS?

3 A. YES.

4 Q. AND MOTHER'S DAY OF THIS YEAR, DID YOU GO TO SAN
5 YSIDRO TO VISIT YOUR MOTHER?

6 A. YES, I DID.

7 Q. AND WHILE YOU WERE IN SAN YSIDRO AT YOUR MOTHER'S
8 HOUSE, DID YOU RECEIVE A CALL?

9 A. YES.

10 Q. AND WHO WAS THAT CALL FROM?

11 A. FROM MY FRIEND, JOSE LEON.

12 Q. JOSE LEON?

13 A. YEAH.

14 Q. DID HE INVITE YOU TO GET TOGETHER?

15 A. WE BOTH AGREED ON JUST SPENDING SOME -- SOME TIME,

16 AND --

17 Q. DID YOU GUYS DECIDE TO GET TOGETHER?

18 A. YEAH, WE DECIDED TO GET TOGETHER.

19 Q. DID YOU HAVE A LITTLE BIT TO DRINK WHEN YOU GOT
20 TOGETHER?

21 A. OH, YES.

22 Q. THIS WAS LATE AT NIGHT?

23 A. YES.

24 Q. OKAY. DID YOU -- WERE YOU USING ANY DRUGS THAT
25 NIGHT?

26 A. AT THE TIME WE WERE DRINKING, I TOOK SOME PILLS
27 CALLED -- THEY'RE CALLED ROCHES, I GUESS, DATE RAPE. IT'S A
28 PILL WHERE YOU GET YOU KNOW MEMORY LOSS AND WHATEVER. IT

Research Agent

1 RELAXES YOU, YOU KNOW?

2 Q. DID YOU FEEL AT SOME POINT IN TIME, DID YOU FEEL
3 THE EFFECT OF THE DRUGS OR THE PILLS?

4 A. OH, YEAH.

5 Q. TELL US HOW YOU FELT? WHAT WERE YOU FEELING AFTER
6 YOU STARTED FEELING THE EFFECT?

7 A. WELL, WHEN YOU'RE -- I GUESS -- WELL, IT MAKES ME
8 FEEL WHEN I TAKE THEM, LIKE, I SAY, IT RELAXES ME. AT THE
9 TIME, I'M DOING EVERYTHING IN SLOW MOTION, AND I DON'T
10 ACKNOWLEDGE SOMETIMES WHAT I'M DOING. IT'S KIND OF HARD TO
11 EXPLAIN. I MEAN, I WOULD APPRECIATE IF THERE WAS SOME KIND
12 OF EVALUATION ON THAT PILL. BUT IT'S KIND OF HARD TO EXPLAIN
13 FOR MYSELF WHAT IT DOES TO ME. THERE'S PARTS WHERE THAT --
14 WHAT THAT PILL DOES IS IT BLANKS YOU OUT FOR A CERTAIN TIME,
15 AND THEN YOU COME BACK TO YOUR SENSES, AGAIN, LIKE, AND YOU
16 SEE THINGS BLURRY, YOU KNOW. YOU'RE NOT IN -- YOU'RE NOT IN
17 THE RIGHT STATE OF MIND, BASICALLY. YOU'RE NOT FOCUSED ON
18 WHAT YOU'RE DOING. YOU'RE NOT NORMAL.

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CAUSE

19 Q. SO YOU DIDN'T FEEL A NORMAL STATE OF MIND?

20 A. NO, I DID NOT.

21 Q. OKAY. BUT YOU REMEMBER YOU WERE DRIVING. WERE YOU
22 DRIVING AROUND?

23 A. YES.

24 Q. OKAY. AND SO YOU AND YOUR FRIEND MR. LEON WERE
25 DRIVING AROUND THAT NIGHT IN THE CAR, AND YOU'D BEEN TAKING
26 THESE PILLS, AND YOU WERE FEELING HIGH?

27 A. YES.

28 Q. DO YOU RECALL MAKING A STOP SOMEPLACE?

1 A. DO I HAVE TO KNOW EXACTLY WHERE?

2 Q. NO, NO. I'M JUST ASKING YOU IF YOU RECALL MAKING A
3 STOP SOMEPLACE?

4 A. YES.

5 Q. DO YOU RECALL WHY YOU HAD TO STOP?

6 A. TO URINATE.

7 Q. WAS IT -- DO YOU RECALL IF IT WAS A PARKING LOT OR
8 NOT?

9 A. I RECALL, LIKE, GOING INTO, I THINK IT'S APARTMENTS
10 OR HOUSES. I DON'T KNOW, LIKE, APARTMENTS, AND JUST PARKING
11 AND OPEN THE DOOR. AND I JUST WAS TAKING A -- I WAS
12 URINATING BEHIND A CAR. PEOPLE --

13 Q. YOU WERE BEHIND A CAR?

14 A. YEAH. I GUESS I FIGURED NOBODY WOULD SEE ME. I
15 DIDN'T REALIZE IT WAS AT 3 O'CLOCK IN THE MORNING, TOO, SO --

16 Q. SO YOU REALLY DIDN'T KNOW WHAT TIME IT WAS?

17 A. NO, BECAUSE MY SENSE TELLS ME, YOU KNOW, URINATE
18 BEHIND A CAR JUST BECAUSE NOBODY WILL SEE YOU. BUT I DIDN'T
19 EVEN NOTICE WHAT TIME IT WAS REALLY.

20 Q. NOW, DO YOU RECALL AT SOME POINT IN TIME GOING AND
21 GETTING YOUR GUN?

22 A. YES.

23 Q. WHAT DID YOU DO WITH THE GUN?

24 A. I JUST GOT IT AND SHOT IT IN THE AIR.

25 Q. WHERE WAS THE GUN?

26 A. IT WAS IN THE SPARE TIRE UNDERNEATH, YOU KNOW, YOU
27 HAVE THE SPARE TIRE.

28 Q. IN THE BACK OF THE --

COURT OF APPEAL -- STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA,	)	FROM SAN DIEGO COUNTY
PLAINTIFF AND RESPONDENT,	)	HON. ESTEBAN HERNANDEZ,
	)	JUDGE
VS.)	
)	
JAVIER RODRIGUEZ,	)	APPEAL NO. D043198
DEFENDANT AND APPELLANT.)	NO. SCS176087

REPORTER'S TRANSCRIPT ON APPEAL

AUGUST 13, 2003

SAN DIEGO, CALIFORNIA

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FOR THE DEFENDANT AND APPELLANT: JAVIER RODRIGUEZ
IN PRO PER

REPORTED BY: IRENE PERKINS, CSR 12727

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN DIEGO, SOUTH COUNTY DIVISION
DEPARTMENT 14 BEFORE HON. ESTEBAN HERNANDEZ, JUDGE

PEOPLE OF THE STATE OF CALIFORNIA,)

PLAINTIFF,)

VS.)

JOSE LUIS LEON,)

&)

JAVIER RODRIGUEZ,)

DEFENDANTS.)

CASE NO. SCS176087

REPORTER'S TRANSCRIPT OF PROCEEDINGS

AUGUST 13, 2003

APPEARANCES:

FOR THE PLAINTIFF: SOPHIA ROACH
DEPUTY DISTRICT ATTORNEY

FOR DEFENDANT LEON: JERRY LEAHY
ATTORNEY AT LAW

FOR DEFENDANT RODRIGUEZ: BENJAMIN SANCHEZ
ATTORNEY AT LAW

1 MS. ROACH: YES, WE WITHDREW THAT LAST TIME.

2 THE COURT: THAT WAS WITHDRAWN.

3 MR. LEAHY: AND 2.72 HAS ALSO BEEN WITHDRAWN?

4 MS. ROACH: THAT'S BEEN WITHDRAWN.

5 THE COURT: YES.

6 MR. LEAHY: OKAY. THANK YOU.

7 THE COURT: OKAY. THEN WE HAVE 2.90, 3.00, 3.01.

8 NOW, HERE -- NOW, 3.02, WE HAVE THE NEW ONE.

9 MS. ROACH: AND, YOUR HONOR, AFTER WE TALKED, I
10 WENT BACK AND LOOKED THROUGH THIS INSTRUCTION CAREFULLY. THE
11 GENERAL AIDING AND ABETTING INSTRUCTION WILL APPLY TO
12 MR. RODRIGUEZ, BUT WE ARE NOT ALLEGING THAT HE AIDED AND
13 ABETTED UNDER THE NATURAL AND PROBABLE CONSEQUENCES THEORY.
14 SO I TAILORED THIS SOLELY TO FIT MR. LEON AND THE WITNESS
15 INTIMIDATION COUNT. AND IN MY MIND, THAT'S HOW IT'S PROPERLY
16 ARGUED.

17 THE COURT: OKAY. SO THE PEOPLE HAVE ELECTED TO
18 PURSUE IT IN THAT FASHION?

19 MS. ROACH: CORRECT.

20 THE COURT: OKAY. ANY OBJECTION?

*Nothing
from Sanchez!*

21 MR. LEAHY: I WAS JUST READING IT, YOUR HONOR.

22 THE COURT: WELL, IF YOU HAVE A CONCERN, WHY DON'T
23 WE JUST PUT A POST-IT ON IT FOR NOW AND THEN WE'LL COME BACK.

24 MR. LEAHY: VERY GOOD, YOUR HONOR. I THINK THAT I
25 DO HAVE A QUESTION ABOUT IT.

26 THE COURT: OKAY. NEXT, WE HAVE 3.03, TERMINATION
27 OF LIABILITY. AND ON 3.30, NOW, HERE THERE WAS A POST-IT
28 BECAUSE OF COUNT 5, BUT NOW COUNT 5 HAS BEEN DISCUSSED, SO

1 THAT SHOULD BE 5 -- HOLD ON JUST A SECOND. I WAS SKIPPING
2 OVER 3.03. THERE WAS A NEW ONE. YOU'VE MADE A MODIFICATION.
3 OH, I SEE. YOU CHANGED IT, "BEFORE THE COMMISSION OF THE
4 CRIMES CHARGED," RATHER THAN COUNTS 1 AND 2. YOU MADE IT
5 GENERAL.

6 MS. ROACH: CORRECT, BECAUSE WE WILL BE PURSUING AN
7 AIDING AND ABETTING THEORY ON MR. RODRIGUEZ ON COUNT 1, JUST
8 NOT BY VIRTUE OF NATURAL AND PROBABLE CONSEQUENCES.

9 THE COURT: OKAY. SO WE'LL INSERT THE NEW ONE. DO
10 YOU HAVE A QUESTION ON THAT?

11 MR. LEAHY: I'M SORRY, YOUR HONOR. WHICH ONE ARE
12 WE SPEAKING OF NOW?

13 THE COURT: 3.03. THERE'S A NEW VERSION, AND
14 BASICALLY IT'S MODIFIED -- TAKEN OUT COUNTS 1 AND 2 AND LEFT
15 IT OPEN.

16 MR. LEAHY: THAT'S FINE, YOUR HONOR.

17 THE COURT: OKAY. NEXT WE HAVE 3.30, THEN 3.31,
18 14.58 --

19 MR. LEAHY: YOUR HONOR, I HAVE A -- COULD -- I
20 WOULD NEED A COUPLE OF MINUTES TO TAKE A CLOSE LOOK AT 3.31.
21 IF WE CAN PUT A POST-IT NOTE ON THAT ONE.

22 THE COURT: OKAY. WE'LL PUT A POST-IT ON 3.31.
23 THEN WE HAVE 14.58. THEN WE HAVE 14.54. AND WE DO HAVE THE
24 NEW ONE THAT SUBSTITUTES A VEHICLE FOR STRUCTURE. JUST
25 CORRECT THAT. 14.56 --

26 MS. ROACH: AND, YOUR HONOR, ON THE VERDICT FORMS,
27 I'VE JUST ELIMINATED THE FIRST DEGREE LANGUAGE. SO I'M NOT
28 SURE THAT WE NEED 14.56. WE ARE NOT GOING TO BE ASKING THEM

1 A. WELL, YEAH. I MEAN, SOMEBODY TASES YOU, YOU'RE
2 GOING TO FEEL IT. AFTER THAT, THEY TOOK ME TO THE VEHICLE
3 AND I FELL ASLEEP. I KNOCKED UNCONSCIOUS IN THE CAR.

4 Q. YOU WERE KNOCKED UNCONSCIOUS, OR YOU FELL ASLEEP?

5 * A. WELL, LET ME REPHRASE THAT. YEAH, I PASSED OUT.

6 Q. WHEN DID YOU DO THE DRUGS?

7 A. WHEN?

8 Q. YES.

9 A. WHEN WE WERE OUTSIDE THE HOUSE.

10 Q. OUTSIDE OF MR. LEON'S HOUSE?

11 A. YES.

12 Q. DID YOU BUY THEM?

13 A. NOPE.

14 Q. DID MR. LEON BUY THEM?

15 A. NOPE.

16 Q. WHO ELSE WAS WITH YOU?

17 A. WHO ELSE WAS WITH US?

18 Q. YES. WHO ELSE WAS WITH YOU?

19 A. NOBODY.

20 Q. DID SOMEBODY COME BY IN A CAR AND THROW THE DRUGS
21 OUT THE WINDOW AT YOU? I MEAN, HOW DID THEY COME INTO YOUR
22 POSSESSION?

23 A. WELL, ALL I CAN SAY IS THAT I TOOK THEM. I TOOK
24 THE DRUGS.

25 Q. WHAT KIND OF DRUGS AGAIN ARE THESE?

26 A. ROCHES.

27 Q. AND YOU DON'T KNOW WHAT SPECIFICALLY THEY ARE, DO
28 YOU?

1 YOURSELVES OR WITH ANYONE ELSE ON ANY SUBJECT CONNECTED WITH
2 THE TRIAL, OR TO FORM OR EXPRESS ANY OPINION UNTIL THE CASE
3 IS FINALLY SUBMITTED TO YOU. OUR 15 MINUTE BREAK.

4 (AT 10:03 A.M. THE JURY WAS EXCUSED AND THE
5 FOLLOWING PROCEEDINGS WERE HAD:)

6 THE COURT: ALL RIGHT. RECORD WILL REFLECT THE
7 JURY HAS LEFT THE ROOM. COUNSEL ARE PRESENT, DEFENDANT IS
8 PRESENT. MR. LEAHY.

9 ~~MR.~~ MR. LEAHY: YOUR HONOR, I NEED TO KNOW BASED ON THE
10 STATE OF THE EVIDENCE IF THE COURT WILL INSTRUCT THE JURY
11 WITH REGARD TO VOLUNTARY INTOXICATION REGARDING MR. LEON.

12 THE COURT: OKAY. HAVE A SEAT. WE NEED TO TALK
13 ABOUT THAT. WELL, THERE HAS BEEN TESTIMONY FROM
14 MR. RODRIGUEZ THAT MR. LEON DID INGEST THE DATE RAPE DRUG,
15 FIVE DATE RAPE DRUGS, HALF OF A RACK, AS WELL AS TWO 40 OUNCE
16 BEERS AND SOME CORONAS, WHICH WOULD SEEM TO WARRANT GIVING
17 THAT AS TO BOTH DEFENDANTS. AND SO MS. ROACH, DO YOU WISH TO
18 BE HEARD ON THAT?

19 MS. ROACH: YES, YOUR HONOR. PEOPLE DISAGREE.
20 WHAT MR. LEON HAS TESTIFIED TO IS THAT HE, HIMSELF --

21 MR. LEAHY: MR. LEON DID NOT TESTIFY.

22 MS. ROACH: I'M SORRY. MR. RODRIGUEZ HAS TESTIFIED
23 TO WAS THAT HE HIMSELF WAS IMPAIRED. HE WAS NOT SEEING
24 THINGS OR HEARING THINGS CLEARLY. HIS PERCEPTION WAS
25 DISTORTED. THERE'S BEEN ABSOLUTELY NO EVIDENCE AS TO WHAT
26 THE EFFECT WAS ON MR. LEON WHETHER OR NOT HE WAS INTOXICATED.
27 IT DOESN'T TALK ABOUT VOLUNTARY INGESTION. IT TALKS ABOUT
28 INTOXICATION. *THERE'S BEEN NO EXPERT TESTIMONY REGARDING

1 WHAT THESE PILLS WOULD DO TO YOU, NO FOUNDATION THAT THEY
2 WERE IN FACT EVEN WHAT MR. RODRIGUEZ SAYS THEY WERE. THERE'S
3 NO CHEMICAL ANALYSIS. I THINK THAT THERE IS NO COMPETENT
4 EVIDENCE WHICH CAN BE USED TO SUPPORT MR. LEON'S TRYING TO
5 USE THAT PARTICULAR DEFENSE WITH THE STATE OF THE EVIDENCE AS
6 IT CURRENTLY SITS.

7 THE COURT: OKAY. MR. LEAHY.

8 MR. LEAHY: YOUR HONOR, WE HAD -- WE'VE GOT
9 TESTIMONY FROM MR. RODRIGUEZ THAT HE PERSONALLY OBSERVED, AS
10 THE COURT INDICATED, PERSONALLY OBSERVED MR. LEON TAKING
11 FIVE OF THESE PILLS. HE'S ALSO TESTIFIED THAT HE WAS HIGH.
12 HE TESTIFIED THAT HE'S TAKEN THEM MANY TIMES. YOU TAKE TWO
13 OF THEM, THEN YOU'RE ALREADY LOOPED. I THINK THE JURY CAN
14 REASONABLY CONCLUDE THAT IF SOMEBODY TAKES FIVE, THEY'RE IN
15 PRETTY BAD SHAPE. HE TESTIFIED THAT HE TOOK HALF THE RACK,
16 FIVE, MR. LEON TOOK HALF THE RACK, FIVE. HE TESTIFIED HOW
17 HIGH HE WAS AND HOW DIFFICULT HIS MEMORY IS REGARDING THE
18 EVENTS OF THAT EVENING BECAUSE OF THE DRUGS THAT HE TOOK. HE
19 TESTIFIED THAT HE SAW HIM DRINK TWO 40 OUNCE BOTTLES OF BEER
20 AND SOME CORONAS. I THINK THE JURY CAN TAKE THAT
21 INFORMATION. I THINK WE HAVE THE RIGHT TO TELL THEM THAT IF
22 THEY FIND IT THAT -- I THINK THAT THE JURY SHOULD BE
23 INSTRUCTED JUST AS MR. RODRIGUEZ WILL BE INSTRUCTED REGARDING
24 HIS SITUATION THAT THEY CAN TAKE INTO CONSIDERATION VOLUNTARY
25 INTOXICATION.

26 THE COURT: OKAY. MR. SANCHEZ, DO YOU WISH TO BE
27 HEARD OR NOT?

28 ~~*~~ MR. SANCHEZ: NO, YOUR HONOR.

1 THE COURT: OKAY. BASED ON THE EVIDENCE PRESENTED
2 INCLUDING THE ADMISSION DURING THE TRIAL, THE COURT WILL FIND
3 TRUE THE STRIKE PRIOR ALLEGATION THAT MR. RODRIGUEZ WAS
4 CONVICTED ON APRIL 22ND, 1999, OF PENAL CODE SECTION 459 IN
5 SAN DIEGO SUPERIOR COURT, COURT NUMBER SCD142327.

6 ANYTHING FURTHER?

7 MS. ROACH: NO, YOUR HONOR.

8 MR. SANCHEZ: NO, YOUR HONOR. I JUST WOULD LIKE TO
9 INQUIRE AS TO THE SENTENCING DATE?

10 THE COURT: YES. HIS SENTENCING DATE IS CURRENTLY
11 SET FOR SEPTEMBER 15TH. AND MR. LEAHY -- SINCE YOU WERE GONE
12 AND YOU HAD WAIVED YOUR PRESENCE, INDICATED THAT ON THAT DATE
13 SEPTEMBER 15TH, THERE MAY BE A MOTION FOR NEW TRIAL OR
14 SIMILAR MOTIONS. AND IF THERE WAS SUCH A MOTION FILED, THEN
15 THAT DATE WOULD BE VACATED, AND THEN A NEW DATE OF OCTOBER
16 14TH WOULD BE SET. SO IT'S BASICALLY A CONTINGENT DATE.
17 IT'S ONE OF THOSE TWO DATES DEPENDING ON WHETHER A --

18 MR. SANCHEZ: SEPTEMBER 15TH?

19 THE COURT: SEPTEMBER 15TH.

20 MR. SANCHEZ: AT WHAT TIME?

21 THE COURT: AT 9 O'CLOCK IN THIS DEPARTMENT.

22 MR. SANCHEZ: OKAY. I'M IN FEDERAL COURT THAT
23 MORNING. BUT I SORT OF ANTICIPATE THERE MIGHT BE A MOTIONS,
24 SO I'M NOT SURE.

25 THE COURT: HOW ABOUT OCTOBER 14TH?

26 MR. SANCHEZ: OCTOBER 14TH. I WANTED TO MEET WITH
27 HIM.

28 THE COURT: RIGHT. I WOULD SPECULATE THAT YOU AND

1005-1100

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MR. LEAHY WOULD CONFER ABOUT ANY MOTIONS TO FILE AND SO
FORTH.

MR. SANCHEZ: SURE. WOULD THAT BE IN THE MORNING,
YOUR HONOR, OCTOBER 14TH?

THE COURT: YES, OCTOBER 14TH WOULD ALSO BE 9 A.M.
IN THIS DEPARTMENT.

MR. SANCHEZ: OKAY. THAT'S FINE, YOUR HONOR.
THANK YOU.

THE COURT: OKAY. THANK YOU VERY MUCH.

MS. ROACH: SO ARE WE SETTING THE SEPTEMBER DATE OR
THE OCTOBER DATE?

THE COURT: WELL, WE SET BOTH DATES BECAUSE
SEPTEMBER 15 WOULD BE THE REGULAR SENTENCING DATE. BUT IF
THERE'S A DEFENSE MOTION, THEN IT WOULD BE KICKED OVER TO
OCTOBER 14TH.

MS. ROACH: ALL RIGHT. THANK YOU.

THE COURT: OKAY.

MS. ROACH: THANK YOU, YOUR HONOR.

THE COURT: THANK YOU.

(AT 10:12 A.M. AN ADJOURNMENT WAS TAKEN UNTIL
OCTOBER 14TH, 2003.)

- - -

(THIS PAGE DESIGNATED 1005-1100 FOR BLOCK-NUMBERING
PURPOSES ONLY. PROCEEDINGS CONTINUE ON PAGE 1101.
NOTHING OMITTED.)

1 CHULA VISTA, CALIFORNIA, TUESDAY, OCTOBER 14, 2003

2

3 THE COURT: GOOD MORNING, EVERYONE.

4 MS. ROACH: GOOD MORNING, YOUR HONOR.

5 MR. SANCHEZ: GOOD MORNING, YOUR HONOR.

6 THE COURT: ALL RIGHT. CALLING THE CASE OF PEOPLE

7 VERSUS JAVIER RODRIGUEZ, CASE SCS176087.

8 MS. ROACH: SOPHIA ROACH APPEARING ON BEHALF OF THE
9 PEOPLE.

10 MR. SANCHEZ: BEN SANCHEZ ON BEHALF OF JAVIER
11 RODRIGUEZ WHO IS PRESENT BEFORE THE COURT IN CUSTODY.

12 THE COURT: THE COURT HAS READ AND CONSIDERED THE
13 PROBATION REPORT AND THE SUPPLEMENTAL PROBATION REPORT AS WELL
14 AS THE DEFENSE STATEMENT IN MITIGATION AND THE ATTACHMENTS, ALL
15 OF THE LETTERS AND DOCUMENTS INCLUDING THE LETTER FROM DELANCY
16 STREET AND THE CERTIFICATES AND AT THIS TIME I WILL HEAR ANY
17 ADDITIONAL ARGUMENTS THAT YOU WISH TO MAKE.

18 MR. SANCHEZ: YOUR HONOR, MR. RODRIGUEZ HAS HANDED
19 TO ME THIS MORNING THREE ADDITIONAL LETTERS THAT HE WOULD LIKE
20 THE COURT TO SEE.

21 THE COURT: ALL RIGHT.

22 MR. SANCHEZ: I DON'T HAVE COPIES, BUT THEY'RE
23 LETTERS FROM HIS MOTHER, ONE FROM HIS SISTER.

24 THE COURT: THANK YOU. ALL RIGHT. THE COURT HAS
25 READ AND CONSIDERED THE THREE ADDITIONAL LETTERS. THAT WILL BE
26 MADE PART OF THE FILE.

27 MR. SANCHEZ: YOUR HONOR, THIS IS SOME WHAT OF A
28 TROUBLING CASE FOR ME IN TERMS OF ATTEMPTING TO ADDRESS THE

1 SENTENCING BECAUSE OF THE CONSEQUENCES OF THIS CASE. AS IT
2 TURNS OUT, THE GANG ALLEGATIONS AS THEY ARE WRITTEN ARE TO ME
3 VERY TROUBLING IN THAT THE SITUATION THAT WE HAD IN THIS
4 PARTICULAR CASE MR. RODRIGUEZ IS ADMITTINGLY A FORMER GANG
5 MEMBER. HE IS NO LONGER A GANG MEMBER.

6 I THINK THE EVIDENCE WAS PRETTY SUFFICIENT IN
7 THAT REGARD UNDERSTANDING, OF COURSE, THAT FOR THIS ALLEGATION
8 HE DOESN'T EVEN HAVE TO BE A GANG MEMBER AND THAT HAS BEEN
9 SOMETHING THAT HAS BEEN VERY DIFFICULT FOR MR. RODRIGUEZ TO
10 UNDERSTAND. I FIND THAT SOMEWHAT TROUBLING MYSELF.

11 MR. RODRIGUEZ, ALTHOUGH HE DID MAKE THAT
12 MISTAKE, HE DID COMMIT A CRIME AND HE ADMITS IT AND HE IS
13 PREPARED TO FACE THE CONSEQUENCES OF IT. HE -- HE AT SOME
14 POINT IN HIS LIFE, SOME FOUR OR FIVE YEARS AGO, DECIDED HE NO
15 LONGER WANTED ANY PART OF THE GANG LIFE AND HE -- HE ATTEMPTED
16 TO DO SOMETHING ABOUT IT.

17 HE MOVED OUT OF THE NEIGHBORHOOD. HE -- HE HAD
18 A WIFE AND TWO CHILDREN. HE WORKED, SUPPORTED THE FAMILY,
19 LIVED WHAT MOST PEOPLE CONSIDERED A NORMAL LIFE, BUT HE STILL
20 MAINTAINED A DRUG PROBLEM AND THAT IS HOW I WOULD DESCRIBE --
21 IF I HAD TO DESCRIBE THIS CASE IT WOULD BE MORE OF A DRUG CASE
22 AS OPPOSED TO A GANG CASE, AND MR. RODRIGUEZ HAS DONE -- SINCE
23 HE'S IN CUSTODY A LOT OF THINGS HAVE HAPPENED TO HIM MENTALLY.

24 HE'S VERY FEARFUL OF LOOSING HIS FAMILY, HIS
25 WIFE AND HIS TWO CHILDREN. HE HAS ATTEMPTED TO DO EVERYTHING
26 HE COULD TO SOMEHOW TURN HIS LIFE AROUND AND HE EVEN STARTED
27 THAT BEFORE HE CAME INTO CUSTODY, BUT BECAUSE OF THE WAY THE
28 LAW IS WRITTEN NOW AND BECAUSE OF -- I UNDERSTAND WE HAVE

1 SEVERAL PROBLEMS WITH THE LEGISLATURE TO WORK WITH AND THEY
2 DRAFT AS MANY NEW LAWS AS POSSIBLE, BUT IT IS SORT OF -- IT
3 SORT OF ENCOMPASSES EVERYBODY AND THERE IS NO OUTS.

4 THERE IS NO -- THERE IS NO WAY FOR SOMEBODY
5 LIKE MR. RODRIGUEZ WHO FELL BACK, MADE A MISTAKE. NOW, IT IS
6 TRUE THAT HE PROBABLY SHOULD NOT BE WITH HIS CO-DEFENDANT THAT
7 NIGHT AND AS IT TURNS OUT MAY HAVE EVEN BEEN A WORSE SITUATION
8 THAN FIRST THOUGHT.

9 HOWEVER, I THINK IT IS VERY UNDERSTANDABLE WHEN
10 MR. RODRIGUEZ' MOTHER AND FATHER REMAIN LIVING WHERE THEY HAVE
11 ALWAYS LIVED IN SAN YSIDRO THAT HE WILL BE BACK IN THE
12 NEIGHBORHOOD AT THE VERY MINIMUM TO VISIT HIS MOTHER ON
13 MOTHER'S DAY. THERE IS NOTHING UNREASONABLE ABOUT THAT.

14 I THINK IN THIS CASE WHAT I'M ASKING THE COURT
15 TO DO IS TO LOOK AT THE CONDUCT OF MR. RODRIGUEZ IN THIS CASE
16 AND SENTENCE HIM BASED ON THAT AS OPPOSED TO WHAT TONS OF
17 ALLEGATIONS AND ENHANCEMENTS CAN DO FOR HIM OR WOULD DO FOR
18 HIM.

19 I WOULD LIKE TO THINK THAT MR. RODRIGUEZ IS NOT
20 ENDING HIS LIFE AT THIS POINT BECAUSE OF THIS CASE. I WOULD
21 LIKE TO SEE HIM AT SOME POINT IN THE FUTURE HAVE ANOTHER CHANCE
22 AND SOMETIME HAVE A FAMILY BECAUSE I THINK THAT HE IS -- AT
23 THIS POINT IN HIS LIFE HAS HEARD ENOUGH AND KNOWS ENOUGH AND IS
24 STRONG ENOUGH NOW TO NEVER HAVE TO GO BACK TO THAT LIFE STYLE
25 AGAIN.

26 MR. RODRIGUEZ WOULD ALSO LIKE TO ADDRESS THE
27 COURT ON HIS OWN BEHALF AND POINT OUT SOME CERTAIN FACTORS HE
28 THINKS THE COURT SHOULD CONSIDER.

1 THE COURT: ALL RIGHT. I'LL HEAR FROM MR. RODRIGUEZ.

2 THE DEFENDANT: STAND UP?

3 THE COURT: GO AHEAD.

4 THE BAILIFF: YOU CAN SIT DOWN.

5 THE DEFENDANT: YOUR HONOR, AS MR. SANCHEZ WAS
6 EXPLAINING, YOU KNOW, THESE LAST FIVE MONTHS HAVE BEEN THE
7 LONGEST FIVE MONTHS IN MY ENTIRE LIFE. FOR THE FIRST TIME IN
8 MY LIFE I'M AWAY FROM MY WIFE AND MY TWO KIDS, ESPECIALLY MY
9 OLDER SON THAT I SO MUCH GREW ATTACHED TO AND I'M FRUSTRATED
10 AND I'M DISAPPOINTED FOR THE OUTCOME OF THIS TRIAL AND
11 ALLEGATIONS, YOU KNOW, AND FOR MANY REASONS AS FAR AS THE GANG
12 ALLEGATIONS, YOUR HONOR, I TOTALLY DISAGREE.

13 YOU KNOW, WHEN I WAS INCARCERATED IN '98 I WAS
14 TIRED OF LIVING THAT LIFESTYLE. I WAS TIRED OF JUST -- I WAS
15 PHYSICALLY JUST TIRED LIVING LIKE THAT. WHEN I WAS RELEASED IN
16 '99 I GOT TOGETHER WITH MY GIRLFRIEND. THAT WAS MY WIFE AND,
17 YOU KNOW, DECIDED I NEEDED TO DO SOMETHING ABOUT IT.

18 SO I MOVED AWAY FROM THE NEIGHBORHOOD AS FAR AS
19 I COULD AND CONTINUED WORKING MAINTAINING MY FAMILY, YOU KNOW,
20 FINANCIALLY AND BEING JUST A PART OF THEIR LIFE AS FAR AS ME
21 BEING WITH MY CHILDREN ALL THE TIME, YOU KNOW, AND I MAINTAINED
22 THOSE THINGS, YOUR HONOR, FOR THREE AND A HALF YEARS AND
23 DEVOTED BASICALLY MY TIME AND MY EFFORT TO MY FAMILY AND MY
24 WORK.

25 I DON'T SEE MYSELF BEING A GANG MEMBER. I
26 CAN'T LIVE A LIFE LIKE THAT. I UNDERSTAND THAT I USED TO BE A
27 GANG MEMBER, YOUR HONOR. I DO ACCEPT THAT, BUT I LET THAT GO.
28 I WANTED TO LIVE A BETTER LIFE WITH MY FAMILY AND MYSELF AND

1 LIKE MR. SANCHEZ IS TRYING TO EXPLAIN IT IS TRUE.

2 IT WAS JUST ONE NIGHT THAT I CONSUMED SO MUCH
3 DRUGS AND ABUSED ON IT. I REALIZED IT COST ME SO MUCH GRIEF,
4 MY FAMILY, AND, YOU KNOW, IT HAS NOTHING TO DO WITH GANGS, YOUR
5 HONOR. I HAD NO INTENTIONS OF DOING NOTHING TO HURT ANYBODY
6 OR, YOU KNOW, I JUST MESSED UP, YOU KNOW, AND I JUST NEED
7 ANOTHER CHANCE.

8 THAT'S ALL. THAT'S IT, YOUR HONOR.

9 THE COURT: OKAY. ANYTHING FURTHER, MR. SANCHEZ?

10 MR. SANCHEZ: NO, YOUR HONOR.

11 THE COURT: MS. ROACH?

12 MS. ROACH: THANK YOU, YOUR HONOR. YOUR HONOR, A
13 JURY SAT AND LISTENED TO THE EVIDENCE IN THIS CASE AND MADE
14 FINDINGS ON EACH OF THE COUNTS AND DETERMINED THAT THESE WERE
15 CRIMES THAT WERE COMMITTED FOR THE BENEFIT OF A CRIMINAL STREET
16 GANG.

17 I DON'T BELIEVE THAT THIS IS THE APPROPRIATE
18 VENUE TO QUESTION THE PROPRIETARY OF THOSE LAWS. THEY ARE
19 CLEARLY PUT INTO PLACE AND REACTION TO THE FACT THAT THERE IS
20 RANDOM VIOLENCE PERPETRATED BY GANG MEMBERS AGAINST MEMBERS OF
21 THE COMMUNITY WHICH IS BEYOND THAT OF OTHER CITIZENS AND THIS
22 CASE REALLY IS AN EXCELLENT EXAMPLE OF THAT.

23 WE HAVE WHAT WOULD NORMALLY BE JUST A TYPICAL
24 VEHICLE THEFT OR PERHAPS A CAR BURGLARY PERHAPS SIMILAR TO ONE
25 THAT MR. RODRIGUEZ WAS INVOLVED IN PREVIOUSLY AND WHEN
26 WITNESSES COME FORWARD TO TRY AND PROTECT THE PROPERTY OF
27 ANOTHER A GUN IS PULLED OUT AND A SHOT IS FIRED.

28 THAT CONDUCT I THINK IS EXACTLY WHAT WAS

1 CONTEMPLATED WHEN THE LEGISLATURE ENACTED PENAL CODE SECTION
2 186.22 AND PENAL CODE SECTION 12022.5. WE DON'T WANT PEOPLE
3 OUT COMMITTING CRIMES FOR THE BENEFIT OF GANGS WHICH ARE
4 CLEARLY MORE VIOLENT THAN OTHER GROUPS WITHIN SOCIETY AND USING
5 FIRE ARMS TO DO SO.

6 ~~THE ONLY EVIDENCE THAT WE HAVE IN THIS CASE~~
7 ~~IS THAT THIS IS SOME TYPE OF DRUG INDUCED ABERRANT BEHAVIOR ON THE~~
8 ~~PART OF MR. RODRIGUEZ IS HIS OWN TESTIMONY,~~ AND I THINK THE
9 COURT PROBABLY REMEMBERS WHAT THE QUALITY AND CHARACTER OF THAT
10 TESTIMONY WAS. IT WAS POOR. IT WAS POOR.

11 ~~HE CLEARLY WAS NOT TELLING THE TRUTH ABOUT WHAT~~
12 ~~HIS PROBLEM WAS.~~ HE WAS WILLING TO INculpATE HIMSELF TO A CERTAIN
13 DEGREE, BUT AT THE SAME TIME NOT WILLING TO INculpATE HIS
14 CO-DEFENDANT. HE BASICALLY MADE A VARIETY OF SELF-SERVING
15 STATEMENTS SO HE COULD ATTEMPT TO GET HIMSELF OUT OF THIS.

16 THE ARGUMENT THAT HE NO LONGER IS ACTIVE WITH
17 THE GANG I THINK ALSO SHOULD FALL ON DEAF EARS BECAUSE THE
18 REALITY IS THAT A NORMAL WORKING PERSON WHO HAS GOT CHILDREN
19 AND A WIFE AND A JOB DOES NOT ~~ALL OF A SUDDEN DECIDE TO DRINK~~
20 ~~PEEP~~ ON THE STREET WITH HIS BUDDY, ~~FOR A BUNCH OF DRUGS~~ THAT ARE
21 RANDOMLY HANDED TO HIM AND THEN GO OUT WITH A FIRE ARM IN HIS
22 VEHICLE AND AMMUNITION ALL OVER HIS CAR TO COMMIT THEFTS.

23 IT IS JUST ~~NOT NORMAL BEHAVIOR.~~ ~~MR. RODRIGUEZ~~
24 ~~HAS HAD THE BENEFIT OF SOMETIME WITHOUT HAVING A PROBLEM,~~ BUT
25 THE REALITY IS THAT ~~HIS PRIOR CRIMINAL HISTORY INCLUDES VERY~~
26 ~~VERY SEMBLAR BEHAVIOR.~~ HE IS STEALING AUTO PARTS. HE GETS
27 CAUGHT. HE INTIMIDATES WITNESSES.

28 THIS IS BEHAVIOR THAT NEEDS TO BE STOPPED AND

Not, howev.
= in frequ
ency.

1 IT IS A LESSON OR MESSAGE THAT HE NEEDS TO SEND TO THIS
2 PARTICULAR GANG COMMUNITY WHICH THE COURT IS PROBABLY AWARE
3 AFTER THE RESULT OF THIS TESTIMONY IS VERY ACTIVE AND, IN FACT,
4 JUST TODAY WE'RE FILING A MURDER CASE THAT INVOLVES TWO OTHER
5 SAN YSIDRO GANG MEMBERS.

6 THIS IS AN ACTIVE VIOLENT GANG. YOUR HONOR, I
7 WOULD REQUEST THAT YOU FOLLOW THE PROBATION OFFICER'S
8 RECOMMENDATION. THERE IS NO JUSTIFICATION TO DEVIATE FROM THE
9 MIDDLE TERM. THERE IS NO MITIGATION WITH THE DEFENDANT WITH A
10 CRIMINAL HISTORY. HE HAS A STRIKE.

11 HE USED A WEAPON. HE FIRED THE WEAPON. BASED
12 ON ALL OF THOSE FACTORS I THINK THAT WHAT PROBATION HAS
13 RECOMMENDED IS WELL DESERVED.

14 THE COURT: MR. SANCHEZ?

15 THE DEFENDANT: YOUR HONOR, CAN I SAY SOMETHING, YOUR
16 HONOR?

17 THE COURT: ALL RIGHT.

18 THE DEFENDANT: YOU KNOW, I UNDERSTAND WHAT SHE IS
19 SAYING ABOUT MY PAST AND AS FAR AS BEING A PARENT AND DOING
20 THIS CRIME, YOUR HONOR. I UNDERSTAND THAT. I UNDERSTAND. I
21 MADE A MISTAKE. YOUR HONOR, I WOULD LIKE TO POINT OUT CERTAIN
22 THINGS.

23 AS FAR AS BENEFITTING FROM A GANG, WHY WOULD I
24 BENEFIT FROM A GANG THAT I'M NO PART OF NO MORE? I'M PART OF
25 THE UNION. I HAVE A PENSION PLAN. I HAD BENEFITS FOR MYSELF,
26 MEDICAL, AND MY WIFE. I HAVE ALL THIS GOING THAT I HAD, BUT
27 FOR THREE YEARS AND A HALF, YOUR HONOR, WHY WOULD I CONSIDER
28 LOOSING ALL THIS VALUE, YOUR HONOR, TO CONSIDER BENEFITTING

1 FROM SOMETHING THAT IS THE VALUE OF STEALING SOME PROPERTY OF A
2 CAR FOR A GANG THAT I'M NOT EVEN PART OF, YOUR HONOR.

3 THAT MAKES NO SENSE, YOUR HONOR, AND AS FAR AS
4 EVERYTHING, JUST AMMUNITION BEING ALL OVER THE VEHICLE, I
5 WASN'T IN THE RIGHT STATE OF MIND. I DIDN'T KNOW WHAT WAS
6 HAPPENING AND AS FAR AS THE ALLEGATION AS FAR AS LEAVING AND
7 SAYING THIS IS WHAT HAPPENED, I HAVE REALLY NO REMEMBRANCE OF
8 WHAT REALLY HAPPENED THAT NIGHT, YOUR HONOR, AND NOW IT COMES
9 OUT TO DRUG USE.

10 I'M NOT HERE MAKING EXCUSES, YOUR HONOR. I
11 KNOW I DID -- I BROKE THE LAW, YOUR HONOR, BUT IT WASN'T
12 INTENTIONALLY DONE AND THIS IS JUST DONE BY A THEORY OR
13 ASSUMPTION BY THE D.A. SAYING THAT WHILE I WAS OUT THERE DOING
14 GANG ACTIVITY HE WAS OUT THERE DOING THIS, AND SHE IS TRYING TO
15 LINK ME WITH OTHER THINGS THAT I HAD NO PART OF, YOUR HONOR.

16 AS FAR AS ME BEING -- YOU KNOW, ONE THING I
17 WOULD LIKE TO EXPLAIN AS FAR AS ME BEING CONTACTED BY THE
18 POLICE THAT IS TAKEN OUT OF CONTENT BECAUSE HERE I AM. I'M
19 GOING TO VISIT MY MOTHER, YOUR HONOR, AND MY BROTHER IS STILL A
20 GANG MEMBER AND THEY HAVE FRIENDS OUT THERE AND DECIDED TO
21 CONSERVATE WITH HIM AND HERE IS A POLICE OFFICER AND HE ROLLS
22 BY. HE DECIDES HE SEES A CRIME.

23 HE WANTS TO KNOW WHAT IS GOING ON FOR NO REASON
24 AND ACCUSES ME. SHE WANTS TO USE THAT. WELL, THERE HAS BEEN
25 SOME GANG ACTIVITY HERE. SO HE WANTS TO KNOW WHAT IS GOING ON.
26 SO HE TAKES DOWN INFORMATION. I COOPERATE. I HAVE NOTHING TO
27 HIDE, YOUR HONOR. I'M DOING GOOD.

28 SO I GAVE MY NAME AND THAT IS BEING USED

CERTIFICATE OF REPORTER

STATE OF CALIFORNIA)
) ss:
COUNTY OF SAN DIEGO)

THE PEOPLE OF THE STATE OF CALIFORNIA

VS.

JAVIER RODRIGUEZ

CASE NO. SCS176087

AUGUST 18, 2003

1001 -- 1005-1100

I, IRENE PERKINS, CSR NO. 12727, A CERTIFIED SHORTHAND
REPORTER IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN
AND FOR THE COUNTY OF SAN DIEGO, HEREBY CERTIFY THAT I MADE A
SHORTHAND RECORD OF THE PROCEEDINGS HAD IN THE WITHIN CASE
AND THAT THE FOREGOING TRANSCRIPT IS A FULL, TRUE, AND
CORRECT TRANSCRIPTION OF THE PROCEEDINGS IN THIS CASE.

DATED THIS 22ND DAY OF DECEMBER, 2003.


IRENE PERKINS, CSR 12727

COPY

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF AND
RESPONDENT,

VS.

JAVIER RODRIGUEZ,

DEFENDANT AND
APPELLANT.

NO. SCS176087

DO 431 98

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY

SOUTH COUNTY DIVISION

BEFORE THE HONORABLE ESTEBAN HERNANDEZ, JUDGE PRESIDING

REPORTER'S TRANSCRIPT ON APPEAL

VOLUME 8

OCTOBER 14, 2003

APPEARANCES:

FOR THE PLAINTIFF
AND RESPONDENT:

BILL LOCKYER
STATE ATTORNEY GENERAL
1515 K STREET
SACRAMENTO, CA 95814

FOR THE DEFENDANT
AND APPELLANT:

IN PROPRIA PERSONA

MELANIE LEITER-HIRSCHORN
CSR NO. 4740
OFFICIAL REPORTER
SAN DIEGO, CALIFORNIA

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

PEOPLE OF THE STATE OF CALIFORNIA,

PLAINTIFF,

VS.

JAVIER RODRIGUEZ,

DEFENDANT.

NO. SCS176087

REPORTER'S TRANSCRIPT

CHULA VISTA, CALIFORNIA

OCTOBER 14, 2003

APPEARANCES:

FOR THE PEOPLE: SYLVIA ROACH
SOCIAL SERVICES: DEPUTY DISTRICT ATTORNEY

FOR THE DEFENDANT: BEN SANCEHZ
ATTORNEY AT LAW

MELANIE HIRSCHORN
CSR 4740
OFFICIAL REPORTER
SAN DIEGO, CALIFORNIA

1 AGAINST ME NOW AND IS TAKEN OUT OF CONTEXT. I'M NOT SAYING
2 THAT I'M DOING GANG ACTIVITY THERE. I'M NOT INVOLVED IN
3 NOTHING. THEY'RE JUST SAYING THAT I'M JUST -- I'M JUST --
4 I'M JUST SEEN WITH ANOTHER GANG MEMBER AND THE SAME THING AS ME
5 JUST WALKING DOWN THE STREET AND ME BUMPING INTO AN OLD FRIEND,
6 YOUR HONOR, AND IT IS JUST TAKEN OUT OF CONTEXT.

7 SO WE HAVE ALL THESE SITUATIONS AND SHE IS
8 MAKING SOMETHING UP AND SHE PUTS OUT THIS IS INVOLVING A GANG
9 AND IT IS JUST A THEORY, YOUR HONOR. IT IS JUST A THEORY, AN
10 ASSUMPTION. THE REAL FACT IS, YOUR HONOR, THAT I KNOW WHAT I
11 DID THAT NIGHT. I APOLOGIZE FOR THAT.

12 IF I DIDN'T HAVE REAL RECOGNITION TO REMEMBER
13 SPECIFICALLY WHAT HAPPENED, OF COURSE, NOT. ~~MYSELF~~
14 ~~MYSELF~~, YOUR HONOR. ~~THAT'S WHAT THIS DRUG DOES TO YOU.~~
15 AS FAR AS WHAT IT REALLY DOES TO YOU MENTALLY YOU'RE NOT OF THE
16 SAME MIND. I UNDERSTAND THAT, YOUR HONOR.

17 I UNDERSTAND THAT, YOUR HONOR. I WOULD LIKE TO
18 ONCE AGAIN ADDRESS THE COURT. I'M NOT MAKING AN EXCUSE, YOUR
19 HONOR. I'M JUST SAYING THAT ~~I HAVE A PROBLEM WITH DRUGS.~~ I
20 REALIZE THAT. I UNDERSTAND I WAS GOING OUT THERE. I NEED TO
21 SEEK HELP.

22 THE REASON WHY I DROPPED THE DRUG CLASS OUT
23 THERE I DIDN'T WANT TO LOOSE A JOB. TO ME THAT WAS A CONCRETE
24 THING. I SHOULD GO. I DO HAVE A PROBLEM. I ACCEPT THAT TO
25 THIS DAY. I DO ACCEPT THAT I DO HAVE A PROBLEM AND I JUST NEED
26 HELP, YOUR HONOR. THAT IS ALL.

27 I'M ASKING FOR HELP. I'M ASKING FOR
28 OPPORTUNITY TO CHANGE. I UNDERSTAND THE D.A. SHE HAS

1 PAPERWORK IN FRONT OF HER OF MY HISTORY AND SHE GOES BY THAT,
2 BUT THERE IS MORE TO IT, YOUR HONOR. THERE IS MORE TO REALLY
3 LOOK INTO.

4 IT'S WHAT REALLY HAPPENED. I LET THAT GO, YOUR
5 HONOR. I LET THAT GANG LIFE GO. I REGRET IT. I REGRET FOR
6 DOING THIS CRIME. I WANT TO CHANGE AND IT HAS NOTHING TO DO
7 WITH GANGS, JUST THE WAY I'M THINKING, THE CHOICES THAT I'M
8 MAKING, MY THINKING PROCESS.

9 I NEED TO VALUE MY FAMILY AND GOING THROUGH THE
10 PROGRAMS HELP ME REALIZE SO MANY THINGS, YOUR HONOR. I WANT TO
11 CONTINUE TO GO TO THESE PROGRAMS. I JUST ASK THE COURT NOT TO
12 GIVE UP ON ME, YOUR HONOR.

13 THANK YOU.

14 THE COURT: THANK YOU. ANYTHING FURTHER,
15 MR. SANCHEZ?

16 MR. ~~SANCHEZ~~: YOUR HONOR, JUST BRIEFLY. HE TALKS
17 ABOUT NORMAL, WHAT THE NORMAL PERSON DOES. I ONLY SUBMIT TO
18 THE COURT THAT ~~WHEN SOMEONE IS UNDER THE INFLUENCE OF NARCOTICS~~
19 ~~OR DRUGS SELDOM IS THEIR CONDUCT NORMAL~~ THE DA THINKS THAT
20 ~~EVERYTHING THAT HAPPENED IN THIS CASE WAS CONSISTENT WITH~~
21 ~~PEOPLE WHO ARE UNDER THE INFLUENCE OF DRUGS~~

22 I DON'T THINK -- I DON'T KNOW HOW THAT CAN EVEN
23 BE DISPUTED REALLY. ~~THE ONLY THING WE HAVE TO GO BY WAS HIS~~
24 ~~TESTIMONY, ~~EVERYTHING HE SAID~~, ~~THE BEHAVIOR~~ WAS~~
25 CONSISTENT WITH PEOPLE UNDER THE INFLUENCE OF DRUGS AND THINGS
26 THAT PEOPLE DO WHILE UNDER THE INFLUENCE OF DRUGS IS NORMAL.

27 EVERYTHING IS RATIONALIZED WHEN PEOPLE ARE
28 UNDER THE INFLUENCE OF DRUGS. SO I FIND THAT THE MOST POWERFUL

failed,
to
subpoena
Xpert. W.

gave cause
to inv. the
test. of
an Xpert

FACTOR IN THIS CASE IS ~~THAT THEY WERE UNDER DRUGS.~~

UNFORTUNATELY -- UNFORTUNATELY HE DIDN'T SEE IT THAT WAY. IT
TURNED OUT TO BE AN OFFENSE.

IT CERTAINLY WAS A HIGHLY MITIGATING FACTOR IN THIS CASE IN MY OPINION. I ASK THE COURT TO TAKE THAT INTO CONSIDERATION IN THE SENTENCE.

THE COURT: OKAY. THANK YOU. PROBATION WILL BE DENIED. THE DEFENDANT IS STATUTORILY INELIGIBLE FOR PROBATION UNDER PENAL CODE SECTION 1203.06 SUBDIVISION (A) (1) AND ALSO PENAL CODE SECTION 667 (B) THROUGH (I). THE COURT WILL FOLLOW THE RECOMMENDATION OF PROBATION AND SENTENCE AS FOLLOWS.

~~ON COUNT 2~~, WHICH IS ~~PENAL CODE SECTION 126.1~~

(B) (1) THE MIDDLE TERM OF ~~[REDACTED]~~ BUT BECAUSE
OF THE STRIKE PRIOR UNDER PENAL CODE SECTION 667(B) THROUGH (I)
THAT WILL BE ~~FORWARDED TO FOUR YEARS FOR THE GANG ALLEGATION~~ OF
PENAL CODE SECTION ~~190.22 SUBDIVISION (B) (1)~~ WHICH IS ~~APPROXIMATE~~
~~TO COUNT TWO.~~

THE COURT WILL IMPOSE A CONSECUTIVE TERM OF
FIVE YEARS. FOR THE PERSONAL USE OF A FIRE ARM ALLEGATION
UNDER PENAL CODE SECTION 12022.5 SUBDIVISION (A) (1) THE COURT
WILL IMPOSE A CONSECUTIVE TERM OF FOUR YEARS WHICH IS THE
MIDDLE TERM.

FOR COUNT 1 WHICH IS PENAL CODE SECTION 459
ONE-THIRD OF THE MID TERM WILL BE IMPOSED. SO IT IS EIGHT
MONTHS DOUBLED TO 16 MONTHS BECAUSE OF THE STRIKE PRIOR
ALLEGATION FOR A TOTAL OF 16 MONTHS WHICH WILL BE IMPOSED
CONSECUTIVELY..

THE GANG ALLEGATION OF PENAL CODE SECTION

1 186.22 SUBDIVISION (B) (1) WHICH IS ATTACHED TO COUNT 1 IS THREE
2 YEARS WHICH IS STAYED PURSUANT TO PENAL CODE SECTION 654. WITH
3 REGARD TO COUNT 3 WHICH IS THE PENAL CODE SECTION 12025
4 SUBDIVISION (B) (3) COUNT THE MIDDLE TERM OF FOUR YEARS WILL BE
5 IMPOSED AND STAYED PURSUANT TO PENAL CODE SECTION 654.

6 THE GANG ALLEGATION ON PENAL CODE SECTION
7 186.22 SUBDIVISION (B) (1) WHICH IS ATTACHED TO COUNT 3 IS THE
8 MIDDLE TERM TWO YEARS WHICH IS STAYED PURSUANT TO PENAL CODE
9 SECTION 654. WITH REGARD TO COUNT 4 THE MIDDLE TERM OF FOUR
10 YEARS IS IMPOSED AND STAYED PURSUANT TO PENAL CODE SECTION 654.

11 THE GANG ALLEGATION IN PENAL CODE SECTION
12 186.22 SUBDIVISION (B) (1) WHICH IS ATTACHED TO COUNT 4 IS THREE
13 YEARS. THAT WILL BE STAYED PURSUANT TO PENAL CODE SECTION 654.
14 ACCORDINGLY, DEFENDANT'S TOTAL TERM IS 14 YEARS AND FOUR
15 MONTHS.

16 HIS CREDITS ARE AS FOLLOWS. 156 ACTUAL WITH 23
17 DAYS OF CREDIT UNDER PENAL CODE SECTION 2933.1 FOR A TOTAL OF
18 179 DAYS CREDIT. DEFENDANT IS ORDERED TO PAY RESTITUTION FINE
19 PURSUANT TO PENAL CODE SECTION 1202.4 SUBDIVISION (B) IN THE
20 AMOUNT OF \$10,000 FORTHWITH OR AS PROVIDED IN PENAL CODE
21 SECTION 2085.5.

22 DEFENDANT IS ORDERED TO PAY AN ADDITIONAL FINE
23 OF \$10,000 PURSUANT TO PENAL CODE SECTION 1202.45 SUSPENDED
24 UNLESS PROBATION IS REVOKED. DEFENDANT IS ORDERED TO PAY
25 DIRECT RESTITUTION TO THE VICTIM DEBRA TUCKER IN THE AMOUNT OF
26 \$250.

27 ~~THIS~~ RESTITUTIO TO DEBRA TUCKER IS ORDERED TO
28 BE PAID PRIOR TO PAYING ANY OTHER FINE OR RESTITUTION~~AND~~ IS

1 ORDERED TO BE PAID JOINTLY AND SEVERELY WITH CO-DEFENDANT JOSE
2 LEON.

3 MR. RODRIGUEZ, IT IS MY DUTY AT THIS TIME TO
4 ADVISE YOU OF YOUR APPEAL RIGHTS. YOU HAVE THE ABSOLUTE RIGHT
5 TO APPEAL FROM THE JUDGMENT OF THIS COURT IN IMPOSING SENTENCE
6 ON YOU TODAY. THAT MEANS IF YOU WISH TO APPEAL, YOU MUST FILE
7 A WRITTEN NOTICE OF YOUR INTENTION TO APPEAL WITHIN 60 DAYS
8 FROM TODAY.

9 AN APPEAL NOT FILED WITHIN 60 DAYS SHALL BE
10 VOID AND OF NO AFFECT. THE NOTICE MUST BE IN WRITING AND
11 SIGNED BY YOU OR YOUR ATTORNEY OR BY BOTH OF YOU. IT MUST
12 SPECIFY WHAT YOU ARE APPEALING FROM AND WHETHER IT IS THE WHOLE
13 JUDGMENT OR JUST PART OF THE JUDGMENT.

14 IF YOU APPEAL AND DO NOT HAVE THE FINANCIAL
15 ABILITY TO RETAIN THE SERVICES OF AN ATTORNEY TO REPRESENT YOU
16 ON APPEAL, THE APPELLATE AUTHORITIES WILL APPOINT COUNSEL TO
17 REPRESENT YOU IN THAT REGARD. IT IS YOUR OBLIGATION TO KEEP
18 THE APPELLATE AUTHORITIES ADVISED AT ALL TIMES OF YOUR CURRENT
19 RESIDENTIAL ADDRESS SO THEY CAN BE IN CONTACT WITH YOU AND
20 ADVISE YOU OF YOUR APPOINTED COUNSEL.

21 PEOPLE MOVE TO DISMISS THE TROLLEY TICKET?

22 MS. ROACH: YES, YOUR HONOR.

23 THE COURT: THAT MOTION IS GRANTED.

24 ANYTHING FURTHER?

25 MR. SANCHEZ: NOTHING FURTHER, YOUR HONOR.

26 MS. ROACH: YOUR HONOR, I BELIEVE ON THE VICTIM
27 RESTITUTION IT SHOULD BE DONNA TUCKER AND I DO HAVE A CR 110
28 FOR THAT.

THE COURT: OKAY. THAT WILL BE MODIFIED TO DONNA
TUCKER. OKAY. THAT WILL BE THE ORDER.

1 STATE OF CALIFORNIA)

2)
3 COUNTY OF SAN DIEGO)
4

5 I, MELANIE HIRSCHORN, CERTIFICATE NO. 4740, A COURT
6 REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN
7 AND FOR THE COUNTY OF SAN DIEGO, HEREBY CERTIFY THAT I REPORTED
8 IN MACHINE SHORTHAND THE PROCEEDINGS IN THE WITHIN CASE, AND
9 THAT THE FOREGOING TRANSCRIPT, CONSISTING OF PAGES 1101 THROUGH
10 1114, IS A FULL, TRUE AND CORRECT TRANSCRIPTION OF THE
11 PROCEEDINGS IN THIS CASE.

12 DATED AT SAN DIEGO, CALIFORNIA, THIS 20th DAY
13 OF December, 2003.
14
15

16
17
18
19
20 Melanie Hirschorn
21 MELANIE HIRSCHORN

22 CSR NO. 4740

23 SUPERIOR COURT REPORTER
24
25
26
27
28



SHERRI R. CARTER
District Court Executive
and Clerk of Court

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**
312 North Spring Street, Room G-8 Los
Angeles, CA 90012
Tel: (213) 894-7984

SOUTHERN DIVISION
411 West Fourth Street, Suite 1053
Santa Ana, CA 92701-4516
(714) 338-4570

EASTERN DIVISION
3470 Twelfth Street, Room 134
Riverside, CA 92501
(951) 328-4450

Tuesday, April 08, 2008

JAVIER ESPINOZA RODRIGUEZ (V15361)
CALIFORNIA MENS COLONY
P.O. BOX 8101
SAN LUIS OBISPO CA 93409-8101

Dear Sir/Madam:

A ☒ Petition for Writ of Habeas Corpus was filed today on your behalf and assigned civil case number
CV08- 2310 JVS (SS)

A ☐ Motion pursuant to Title 28, United States Code, Section 2255, was filed today in criminal case
number and also assigned the civil case number

Please refer to these case numbers in all future communications.

Please Address all correspondence to the attention of the Courtroom Deputy for:

☐ District Court Judge _____

☒ Magistrate Judge Suzanne H. Segal

at the following address:

☒ U.S. District Court
312 N. Spring Street
Civil Section, Room G-8
Los Angeles, CA 90012

☐ Ronald Reagan Federal
Building and U.S. Courthouse
411 West Fourth St., Suite 1053
Santa Ana, CA 92701-4516
(714) 338-4750

☐ U.S. District Court
3470 Twelfth Street
Room 134
Riverside, CA 92501

The Court must be notified within fifteen (15) days of any address change. If mail directed to your address of record is returned undelivered by the Post Office, and if the Court and opposing counsel are not notified in writing within fifteen (15) days thereafter of your current address, the Court may dismiss the case with or without prejudice for want of prosecution.

Very truly yours,

Clerk, U.S. District Court

By: MHERNAND
Deputy Clerk



SHERRI R. CARTER

District Court Executive
and Clerk of Court

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**
312 North Spring Street, Room G-8 Los
Angeles, CA 90012
Tel: (213) 894-3535

SOUTHERN DIVISION

411 West Fourth Street, Suite 1053
Santa Ana, CA 92701-4516
(714) 338-4570

EASTERN DIVISION

3470 Twelfth Street, Room 134
Riverside, CA 92501
(951) 328-4450

Tuesday, April 08, 2008

JAVIER ESPINOZA RODRIGUEZ (V15361)
CALIFORNIA MENS COLONY
P.O. BOX 8101
SAN LUIS OBISPO CA 93409-8101

Dear Sir/Madam:

Your petition has been filed and assigned civil case number CV08- 2310 JVS (SS)

Upon the submission of your petition, it was noted that the following discrepancies exist:

- ☒ 1. You did not pay the appropriate filing fee of \$5.00. Submit a cashier's check, certified bank check, business or corporate check, government issued check, or money order drawn on a major American bank or the United States Postal Service payable to 'Clerk U.S. District Court'. If you are unable to pay the entire filing fee at this time, you must sign and complete this court's Prisoner's Declaration In Support of Request to Proceed In Forma Pauperis in its entirety. The Clerk's Office will also accept credit cards (Mastercard, Visa, Discover, American Express) for filing fees and miscellaneous fees. Credit card payments may be made at all payment windows where receipts are issued.
- ☒ 2. The Declaration in Support of Request to Proceed in Forma Pauperis is insufficient because:
 - ☐ (a) You did not sign your Declaration in Support of Request to Proceed in Forma Pauperis.
 - ☒ (b) Your Declaration in Support of Request to Proceed in Forma Pauperis was not completed in its entirety.
 - ☒ (c) You did not submit a Certificate of Prisoner's Funds completed and signed by an authorized officer at the prison.
 - ☐ (d) You did not use the correct form. You must submit this court's current Declaration in Support of Request to Proceed in Forma Pauperis.
 - ☐ (e) Other: _____

Enclosed you will find this court's current Prisoner's Declaration in Support of Request to Proceed in Forma Pauperis, which includes a Certificate of Funds in Prisoner's Account Form.

Sincerely,

Clerk, U.S. District Court

MHERNAND

By: _____

Deputy Clerk

FILED

2008 APR -8 PM 2:20

CLERK U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

JAVIER ESPINOZA RODRIGUEZ

PLAINTIFF(S)

V.

JOHN C MARSHALL, WARDEN

DEFENDANT(S)

CASE NUMBER

CV08- 2310 JVS (SS)

**NOTICE OF REFERENCE TO A
UNITED STATES MAGISTRATE JUDGE
(Petition for Writ of Habeas Corpus)**

Pursuant to General Order 07-02, the within action has been assigned to the calendar of the Honorable James V. Selna, U.S. District Judge. Pursuant to General Order 05-07, the within action is referred to U.S. Magistrate Judge Suzanne H. Segal, who is authorized to consider preliminary matters and conduct all further hearings as may be appropriate or necessary. Thereafter, unless the Magistrate Judge determines that an evidentiary hearing is required, the Magistrate Judge shall prepare a report and recommendation and file it with the Clerk of the Court which may include proposed findings of fact and conclusions of law where necessary or appropriate, and may include a proposed written order or judgment, which shall be mailed to the parties for objections.

Pleadings and all other matters to be called to the Magistrate Judge's attention shall be formally submitted through the Clerk of the Court.

The Court must be notified within fifteen (15) days of any address change. If mail directed by the clerk to your address of record is returned undelivered by the Post Office, and if the Court and opposing counsel are not notified in writing within fifteen (15) days thereafter of your current address, the Court may dismiss the petition with or without prejudice for want of prosecution.

Clerk, U.S. District Court

April 8, 2008

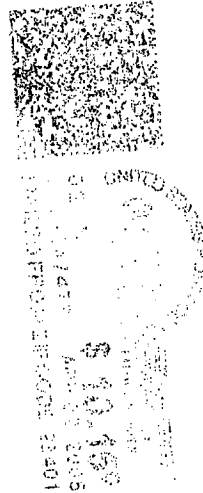
Date

By MHERNAND

Deputy Clerk

APR - 3 2008

CALIFORNIA MEN'S COLONY
STATE PRISON
SAN LUIS OBISPO CA 93409



CLERK OF THE U.S. DISTRICT COURT FOR THE CENTRAL
DISTRICT OF CALIFORNIA
UNITED STATES COURTHOUSE
ATTN: INTAKE/DOCKET SECTION
312 NORTH SPRING STREET
LOS ANGELES, CA 90012
"REGAL MAIL"

FILED

2008 APR -8 PM 2: 20

CLERK U.S. DISTRICT COURT

CENTRAL DIST. OF CALIF.

LOS ANGELES

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA****JAVIER ESPINOZA RODRIGUEZ**

PLAINTIFF(S)

V.

JOHN C MARSHALL, WARDEN

DEFENDANT(S)

CASE NUMBER

CV08- 2310 JVS (SS)**NOTICE OF REFERENCE TO A
UNITED STATES MAGISTRATE JUDGE
(Petition for Writ of Habeas Corpus)**

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Clerk, U.S. District Court

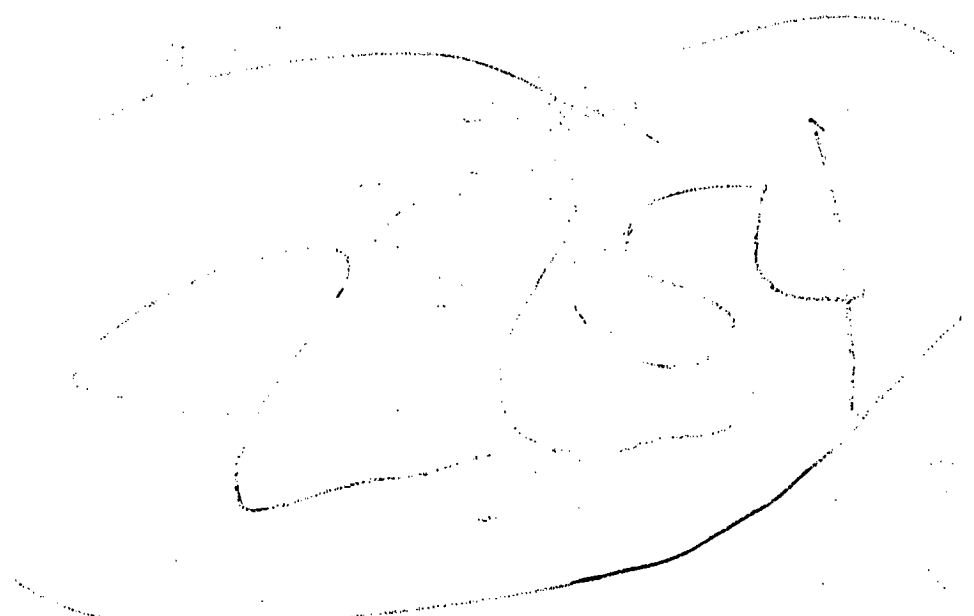
April 8, 2008

Date

By MHERNAND

Deputy Clerk

TER ESPINOZA ROSRIGUEZ V-15361
CALIFORNIA MEN'S COLONY-EAST 5360



APR - 3 2008

CALIFORNIA MEN'S COLONY
STATE PRISON
SAN LUIS OBISPO CA 93409



UNITED STATES POSTAL SERVICE
\$ 40.15
APR 03 2008
SAN LUIS OBISPO CA 93401

CLERK OF THE U.S. DISTRICT COURT FOR THE CENTRAL
DISTRICT OF CALIFORNIA
UNITED STATES COURTHOUSE
ATTN: INTAKE/DOCKET SECTION
312 NORTH SPRING STREET
LOS ANGELES, CA 90012
"LEGAL MAIL"

JS-44

(Rev. 07/89)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE SECOND PAGE OF THIS FORM.)

I (a) PLAINTIFFS

Javier Espinoza Rodriguez

John C. Marshall

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF San Luis Obispo
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT (EXCEPT IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND

2254 1983
FILING FEE PAID
Yes No
MOTION FILED
COPIES SENT TO
Court Press

FILED
JUN - 3 2008
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
DEPUTY

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Javier Espinoza Rodriguez
PO Box 8101
San Luis Obispo, CA 93409
V-15361

ATTORNEYS (IF KNOWN)

'08 CV 1007 H CAB

II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question (U.S. Government Not a Party)
☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PT | DEF | | PT | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. CAUSE OF ACTION (CITE THE US CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY).

28 U.S.C. 2254

V. NATURE OF SUIT (PLACE AN x IN ONE BOX ONLY)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	<input type="checkbox"/> 610 Agriculture	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reappointment
<input type="checkbox"/> Marine	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 362 Personal Injury-Medical Malpractice	<input type="checkbox"/> 620 Other Food & Drug	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 365 Personal Injury - Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	PROPERTY RIGHTS	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 368 Asbestos Personal Injury Product Liability	<input type="checkbox"/> 630 Liquor Laws	<input type="checkbox"/> 820 Copyrights	<input type="checkbox"/> 450 Commerce/ICC Rates/etc.
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers' Liability	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 640 RR & Truck	<input type="checkbox"/> 830 Patent	<input type="checkbox"/> 460 Deportation
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Marine	<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 650 Airline Regs	<input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 345 Marine Product Liability	PERSONAL PROPERTY	<input type="checkbox"/> 660 Occupational Safety/Health	SOCIAL SECURITY	<input type="checkbox"/> 810 Selective Service
<input type="checkbox"/> 153 Recovery of Overpayment of Veterans Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 380 Other Personal Property Damage	<input type="checkbox"/> 690 Other	<input type="checkbox"/> 861 HIA (13958)	<input type="checkbox"/> 850 Securities/Commodities Exchange
<input type="checkbox"/> 160 Stockholders Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> 385 Property Damage Product Liability	LABOR	<input type="checkbox"/> 862 Black Lung (923)	<input type="checkbox"/> 875 Customer Challenge 12 USC
<input type="checkbox"/> Other Contract	<input type="checkbox"/> 360 Other Personal Injury		<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 863 DIWC/DIWW (405(g))	<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 195 Contract Product Liability			<input type="checkbox"/> 720 Labor/Mgmt. Relations	<input type="checkbox"/> 864 SSID Title XVI	<input type="checkbox"/> 892 Economic Stabilization Act
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act	<input type="checkbox"/> 865 RSI (405(e))	<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 510 Motions to Vacate Sentence Habeas Corpus	<input type="checkbox"/> 740 Railway Labor Act	FEDERAL TAX SUITS	<input type="checkbox"/> 894 Energy Allocation Act
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	<input checked="" type="checkbox"/> 530 General	<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	<input type="checkbox"/> 895 Freedom of Information Act
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing/Accommodations	<input type="checkbox"/> 535 Death Penalty	<input type="checkbox"/> 791 Empl. Ret. Inc.	<input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
<input type="checkbox"/> 240 Tort to Land	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 540 Mandamus & Other	<input type="checkbox"/> Security Act		<input type="checkbox"/> 950 Constitutionality of State
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 550 Civil Rights			<input type="checkbox"/> 890 Other Statutory Actions
<input type="checkbox"/> 290 All Other Real Property					

VI. ORIGIN (PLACE AN x IN ONE BOX ONLY)

- ☒ 1 Original Proceeding ☐ 2 Removal from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER f.r.c.p. 23

DEMAND \$

Check YES only if demanded in complaint:

JURY DEMAND: ☐ YES ☐ NO

VIII. RELATED CASE(S) IF ANY (See Instructions): JUDGE

Docket Number

DATE 6/3/2008

SIGNATURE OF ATTORNEY OF RECORD

R. Miller